# TRANSCRIPT OF RECORD.

163-698

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 152.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

H. W. NICKELS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 29, 1892.

(15,115.)

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May session, 1892, of the October term, 1891, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in May, to wit, the second day of May, A. D. 1892, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Be it remembered that heretofore, to wit, on the third day of December, A. D. 1891, a transcript of record in pursuance to a writ of error directed to the circuit court of the United States for the district of Minnesota was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the words and figures following, to wit:

2 United States Circuit Court, District of Minnesota, Fourth Division.

HARRY W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To Oscar B. Hillis, Esq., clerk of the above-named court.

SIR: Please issue a writ of error to the United States circuit court of appeals, eighth circuit, in the above-entitled action, and oblige

Yours truly, JNO. C. BULLITT, JR., AND
TILDEN R. SELMES,
*Attorneys for Defendant.*

Indorsed: No. 12. United States circuit court, district of Minnesota, fourth division. Harry W. Nickels *vs.* Northern Pacific R. R. Co., defendant. Præcipe for a writ of error. Filed Oct. 3d, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States, district of Minnesota, fourth division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1891, thereof, between H. W. Nickels, plaintiff, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of Saint Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 3d day of December, 1891, to the end that the record and proceedings aforesaid being inspected,
3 the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Seal of the United States Circuit Court, District of Minnesota, Fourth Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Issued at office in Minneapolis, with the seal of the United States circuit court, district of Minnesota, and dated as aforesaid.

OSCAR B. HILLIS,
*Clerk of U. S. Circuit Court for District of Minnesota.*

Allowed by—
R. R. NELSON,
*U. S. Dist. Judge.*

Indorsed: U. S. circuit court of appeals for the eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* H. W. Nickels, defendant in error. Writ of error.

UNITED STATES OF AMERICA,
*District of Minnesota, Fourth Division,* } ss:

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal of the United States Circuit Court, District of Minnesota, Fourth Division.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court in and for the district of Minnesota, fourth division.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.

UNITED STATES OF AMERICA.

To H. W. Nickels, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this cita-

tion bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court, district of Minnesota, fourth
4 division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of the circuit court for the district of Minnesota aforesaid, this 3d day of October, A. D. 1891.

R. R. NELSON,
*U. S. District Judge.*

Indorsed: Ent. case No. 12. Original. U. S. circuit court of appeals for the eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* H. W. Nickels, defendant in error. Filed Nov. 14, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Citation.

Service of the within citation admitted this 13th day of October, 1891.

F. D. LARRABEE,
*Att'y for Def't in Error.*

In the United States Circuit Court in and for the District of Minnesota and the Fourth Division Thereof.

H. W. NICKELS, Plaintiff,
*vs.*
THE NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

For complaint herein plaintiff alleges:

That during all the times hereinafter alleged said plaintiff was, and still is, a resident and citizen of the State of Montana, and during all the times hereinafter alleged said defendant was, and still is, a corporation, duly organized, created and existing under and by virtue of the laws of the United States of America, for the purpose of constructing and operating a railroad, and during all the times hereinafter mentioned as such corporation said defendant did own and operate a railroad extending from the city of St. Paul, in the State of Minnesota, through the States of Minnesota, Dakota, Montana, Idaho and Washington.

That on the 16th day of December, A. D. 1889, said plaintiff was and for a period of several days prior thereto had been in the employment of said defendant in the village of Glendive, State of Montana, in the capacity of switchman, and that in said capacity it was the duty of said plaintiff at said place, among other things, to turn switches, couple and uncouple cars and to assist in the making and breaking up of trains and to do such other work as said defendant might and should direct said plaintiff to perform.

4½ That at said time and place, while acting in the capacity as switchman, as aforesaid, said plaintiff was ordered by said

defendant to go in between two certain box cars, one of which was standing still and the other of which was approaching said standing car, and to couple said approaching car to said standing car. That said moving car was next to an engine of the defendant and was being pushed thereby to said standing car that the same might be coupled thereto as aforesaid.

That said defendant at said time and place owed to said plaintiff as such switchman the duty of furnishing to said plaintiff safe, suitable and proper appliances and instrumentalities, including cars and engines, with which said plaintiff could perform his said duties as said switchman so as not unnecessarily to expose said plaintiff to danger of personal injury while performing said duties as such switchman.

That at the time plaintiff received his injuries hereinafter alleged, said engine pushing said car, as aforesaid, towards said standing car, to be coupled to the same, was not, and for a period of several days prior thereto had not, been a safe, fit or proper engine to be used in the business and for the purpose in and for which it was being used at said time in pushing said car as aforesaid in this; that the stop-cocks or steam cocks upon the cylinders of said engine would not and did not close up, but on the contrary, because of some defects in said engine, remained open all of the time and could not be closed; and, also, in this, that the cylinders of said engine were so defective as to allow unusual quantities of steam to escape around the piston-rod, and allowed a large quantity of steam to escape from said engine, which would not have been the case had said engine been in proper repair. That plaintiff knew and had known for a period of several days prior to his injury hereinafter alleged of the unsafe, unfit and improper condition of said engine, and had complained to the defendant of the same several different times, though said plaintiff did not know of all the risks to which said defects exposed him, and said defendant had repeatedly requested said plaintiff to continue in its employment and as often and continuously promised said plaintiff that said engine would be repaired and made safe, fit and proper, though defendant neglected and failed to repair said engine prior to this plaintiff's said injury, though it repaired said engine immediately thereafter.

That said two box cars which said plaintiff was ordered to couple together as aforesaid were not the cars of this defendant but were foreign cars; so called because belonging to some other railway company, and each was provided with what are called double deadwoods, or "man-killers," though plaintiff did not know that said standing car was a foreign car or that it had "man-killers" upon it until after he received his injuries as hereinafter alleged.

That at said place and at about 8 (eight) o'clock p. m. of said day, in obedience to said orders received by said plaintiff from said defendant, and in the fulfilment of said plaintiff's duties to said defendant, as said switchman, said plaintiff at the proper moment entered in between said two cars to couple the same together, and just at the moment when said plaintiff was about to make said coup-

ling a large quantity of steam which had escaped from the cylinders of said engine by reason of said defects hereinbefore stated, entered and flooded in between said two cars where plaintiff was performing his said duties, and completely and quickly obscured all objects from plaintiff's sight, though plaintiff carried a light upon his left arm, and prevented plaintiff from see- that the said standing car had "man-killers" upon it, and by reason of said steam plaintiff could not tell which way to move to prevent injury to himself, and while attempting to extricate himself from his said position, made dangerous by said steam, as aforesaid, plaintiff's right arm was caught between the man-killers of said two cars and so crushed, bruised and mangled that it became necessary so to do, and the same was thereafter amputated near the elbow by the regular physicians employed by the defendant to treat and care for the defendants' employés injured in its service.

That said plaintiff received his said injuries as aforesaid by reason of the negligence of the defendant in providing said unsafe, unfit and improper engine as aforesaid and in not repairing the same after said plaintiff had complained to the defendant of the same, also by reason of all of the facts hereinbefore alleged and without any negligence on the part of the plaintiff whatever.

That at the time the plaintiff received his injuries as aforesaid he was of the age of 24 years, and of robust health, and possessed a good physical frame and was earning wages to the amount of sixty (60) dollars per month.

But by reason of the loss of plaintiff's right arm as aforesaid, plaintiff will never be able to do any more physical labor whatever; that by reason of the injuries received by plaintiff as aforesaid, he suffered great physical and mental pain and suffering and was compelled to submit to many treatments and operations upon his arm by the physicians before the final result of amputating his arm was decided upon.

That by reason of all the facts hereinbefore alleged, the plaintiff has suffered damages in the sum of twenty-five thousand (25,000) dollars.

6 Wherefore plaintiff prays for judgment against the said defendant for the sum of twenty-five thousand ($25,000) dollars, together with the costs and disbursements in this action.

F. D. LARABEE,
*Attorney for Plaintiff*, 923 *Guaranty Loan Building, Minneapolis, Minn.*

Dated January 20th, 1891.

STATE OF MINNESOTA, } ss:
*County of Hennepin,* }

H. W. Nickels, being first duly sworn, upon his oath deposes and says:

That he is the plaintiff in the above-entitled action, that he knows the contents of the foregoing complaint and that the facts therein stated are true to his own knowledge, except those things therein

stated upon his information and belief, and — to those things he believes it to be true.

H. W. NICKELS.

Subscribed and sworn to before me this 20th day of January, A. D. 1891.

[NOTARIAL SEAL.] W. G. HOIT,
*Notary Public, Hennepin County, Minn.*

Indorsed: Ent. case No. 12. Circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific R'y Co. Complaint. Original. F. D. Larabee, attorney for plaintiff, 923 Guaranty Loan, Minneapolis, Minn. Filed January 20th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

NOTE.—The words underscored with red ink in the written complaint constitute plaintiff's amendment, which was made by interlining the original.

Amended complaint filed March 11th, 1891.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.

7 *Summons.*

UNITED STATES OF AMERICA, } ss:
*District of Minnesota, Fourth Division,* }

In the Circuit Court of the United States for the District of Minnesota.

H. W. NICKELS
*against*
THE NORTHERN PACIFIC RAILWAY COMPANY.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Minneapolis, county of Hennepin, and State of Minnesota, and file your answer in said clerk's office, within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded and for the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 20th day

Seal of U. S. Circuit Court.

of January, A. D. 1891. Issued at my office in the city of Minneapolis, under the seal of said circuit court the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.
F. D. LARRABEE,
*Plaintiff's Attorney*.

Indorsed: United States circuit court, district of Minnesota, fourth division. Int. No. 12. H. W. Nichols, plaintiff, *vs.* The Northern Pacific Railway Company, defendant. Summons. Returned and filed January 31st, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. F. D. Larrabee, plaintiff's attorney.

UNITED STATES OF AMERICA, *District of Minnesota*, } *ss*:

*Return of Marshal on Summons.*

I hereby certify and return that at the city of Minneapolis, county of Hennepin, and district aforesaid, on the 21st day of Janu-
8 ary, A. D. 1891, I served the summons hereto attached upon the within-named defendant, The Northern Pacific Railway Company, personally, by handing to and leaving with G. F. McNeill, general ticket agent for the city of Minneapolis, for said company, a certified copy thereof.

Dated this 26th day of January, 1891.

J. C. DONAHOWER,
*U. S. Marshal*.
By GEO. T. D. BAXTER, *Deputy*.

| | |
|---|---|
| U. S. marshal service, fee | $2 00 |
| Travel | 20 |
| | $2 20 |

In the United States Circuit Court in and for the District of Minnesota and the Fourth Division thereof.

H. W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

*Answer.*

Defendant, answering the complaint of the plaintiff herein, admits that it is a corporation organized and existing under the laws of the United States, and engaged in the operation of a railroad substantially as alleged in said complaint; it admits that the plaintiff was in its employ on the 16th day of December, A. D. 1889, and received certain injuries while in its employ, but denies that it has any knowl-

edge or information sufficient to form a belief as to the character, nature or extent of said injuries. Further answering, defendant denies each and every allegation in said complaint contained and every part thereof, except as hereinbefore expressly admitted, qualified or denied, and specifically denies that by reason of any of the matters or things in said complaint contained said plaintiff has suffered damages in the sum of twenty-five thousand — ($25,000) or or in any sum whatsoever.

Wherefore defendant prays that it may be hence dismissed, and for its costs and disbursements herein.

Dated February 9th, 1891.

JOHN C. BULLITT, JR.,
TILDEN R. SELMES,
*Attorneys for Defendant, St. Paul, Minnesota.*

9 STATE OF MINNESOTA, } ss:
*County of Ramsey,* }

Tilden R. Selmes came before me personally, and, being duly sworn, doth say that he is an officer, to wit, assistant counsel in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to these matters that he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me, this 9th day of February, A. D. 1891.

[NOTARIAL SEAL.] EDWIN IRLE,
*Notary Public, Ramsey County, Minnesota.*

Indorsed: Ent. case No. 12. U. S. circuit court, district of Minnesota. H. W. Nickels against N. P. R. R. Co. Answer. Filed Feb. 10, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

HARRY W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

*Amended Answer.*

The defendant, for an amended answer to the complaint of the plaintiff herein, admits that it is a corporation engaged in the operation of a railroad substantially as alleged in said complaint; admits that the plaintiff was, on or about the 16th day of December, 1889, in its employ; admits that the plaintiff did on or about the 16th day of December, 1889, receive some injuries, but denies that it had any knowledge or information sufficient to form a belief as to the character, nature or extent of said injuries.

For further answer in this behalf defendant denies each and every allegation in said complaint contained and every part thereof except as hereinbefore expressly admitted or denied, and specifically denies that by reason of any of the matters or things mentioned in said complaint the plaintiff has been damaged in the sum of twenty-five thousand dollars or any other sum whatsoever.

Defendant further answering, alleges and states that the injuries, if any, received by the plaintiff were caused solely by his own negligence and carelessness and not otherwise.

For a further and second answer defendant shows to the court that on the 12th day of November, 1889, prior to the employment of the plaintiff by the defendant as a switchman in the yard at Glendive, and in consideration of such employment the plaintiff made, executed and delivered to the defendant prior to the time of entering into such employment a certain contract or agreement, called (personal record,) hereto attached and marked Exhibit "B," and made a part of this answer; that under and by virtue of said agreement or contract and as one of the terms and express conditions of said agreement or contract, the plaintiff agreed to observe the rules of the company, and especially rule 25 in said agreement, wherein it is provided that coupling cars by hand is strictly prohibited, and every person in the service of the company is required to use a link, stick or pin in making couplings, and the plaintiff further agreed in said agreement or contract that if he coupled or uncoupled cars by hand he would be responsible for any damage or injury that should occur to him by reason of his failure to comply with said rule and make couplings with a stick instead of by hand.

Defendant further shows that at the time the plaintiff received the injuries complained of in said complaint the plaintiff was negligently and carelessly attempting to couple two cars by hand contrary to the rules of said defendant and said agreement entered into by said plaintiff at the time of his employment.

Defendant further shows that the injuries received by the plaintiff, and mentioned in said complaint, were received by the failure of the plaintiff to use a stick in making said coupling and attempting to make said coupling by hand.

Defendant further alleges and states that the plaintiff carelessly and negligently neglected to examine the cars so as to know the kind and condition of the dead-woods, drawbars, links, pins and apparatus of the two cars he was about to couple before he attempted to make said couplings as required by said rule 25, and that owing to all said acts of carelessness and negligence mentioned herein the plaintiff received the injuries mentioned in said complaint.

JNO. C. BULLITT, JR.,
TILDEN R. SELMES,
*Attorneys for Defendant.*

Dated August 31st, 1891.

11 Northern Pacific railroad.

N. P. R. R. Co.
Received,
Nov. 18, 1889.
Claim dep't.

*Personal Record.*

The superintendent will require all persons, before entering the service of this company, to answer the following interrogatories in their own handwriting. Blanks must be filled up and signed in triplicate; two copies being forwarded to the superintendent with any letters of recommendation which applicant may have, of which a record will be made and letters returned. The applicant will keep the third copy for future reference. Superintendents will forward to general claim agent, St. Paul, one of the copies sent them.

T. F. OAKES,
*President and General Manager.*

To F. H. Marsh, division sup't, Yellowstone division.

1. Age? 23. Married or single? Single.
2. Birthplace? Fon du Lac. State? Wisconsin.
3. Name of parents, if living? Mr. and Mrs. T. C. Nickels. Residence? 719 Third avenue, N. Minneapolis, Minn.
4. Name and degree of nearest relative, if parents are dead? ——. Residence? ——. State? ——.
5. How many years experience in railroad service? 10.
6. Ever injured; if so, on what road and to what extent? No.
7. In what business before entering the railroad business? None. At what place? ——. State? ——.
8. Name all roads on which you have been employed?

| Railroad. | At what station or division. | In what capacity. | In what year. |
|---|---|---|---|
| M. & St. L. | Minneapolis. | Breaking. | 1889. |
| S. P., M. & M. | Minneapolis. | Firing | 1888. |
| S. P. & D. | St. Paul. | Tin shop. | 1888. |

9. If you have been employed before on any division of this road, or branches, state which one, when, and in what capacity. None.

12 10. On what road last employed? M. & St. L.
Cause of leaving? None.

11. Number of letters of recommendation inclosed? ——.
12. How have you been occupied since your last employment terminated? Looking for a job.
13. Have you read and do you understand the following extract from the Book of Rules of the Northern Pacific Railroad Company? Yes.

*Caution as to Personal Safety.*

25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size or strength and is liable to be broken,

and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yardmaster or conductor. Sufficient time is allowed, and may be taken by employés in all cases, to make the examination required.

Coupling by hand is strictly prohibited. Use for guiding the link, a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose as above specified. All persons entering or remaining in the service of the company are warned that the business is hazardous. Each employé is expected and required to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains.

Stepping upon the front and rear of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between cars in motion to uncouple them, and all similar imprudencies are dangerous and in violation of duty, and are strictly prohibited. Employés of every rank and grade are required to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required and, if not, to put them in proper condition or see that they are so put before using them. All will be held responsible accordingly.

14. Do you agree to comply with all the requirements of the foregoing rule in case you enter into the company's employ? Yes.

13 15. You are notified that if you, or any other employé, chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific R. R. Company, you do so solely at your own risk. The company expects you and all other employés to comply strictly with all its rules and regulations, and does not, and will not, in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employé of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes.

16. Do you know that by a rule of said railroad company its employés in all departments are required to give the company ten (10) days' notice of their intention to quit the service, such notice to be given to the superintendent or general foreman of their department, and do you assent to such rule in entering the employment of said company? Yes.

This application made by, Harry Nickels.
(Sign your name in full, no initials.)
Located at, Forsyth.
Dated Nov. 12th, 1889.
Witness, Chas. A. Stillmann.

(Indorsed.)

Northern Pacific railroad.
Personal record.
Harry Nickels.
Occupation, brakeman.
Date of application, Nov. 12, 1889.
Date of employment, June 26, 1889.
Division, Yellowstone.
Above to be filled by division superintendent.

*Description of Person Named Within.*

1. Height, 5 feet 4 inches.
2. Form, heavy.
3. Weight, 160 pounds.
4. Complexion, dark.
5. Color of hair, brown.
14 6. Color of eyes, blue.
7. If beard is worn, what color and in what manner, none.

Above to be filled by applicant.
Certified to as correct.

F. H. MARSH,
*Employer, Sup't.*

DEF'T'S EXHIBIT No. 1.

STATE OF MINNESOTA, } ss:
*County of Ramsey,* }

Tilden R. Selmes, being duly sworn, says that he is an officer, to wit, assistant counsel of the defendant herein, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me this 4th day of September, A. D. 1891.

[NOTARIAL SEAL.] EDWIN IRLE,
*Notary Public, Ramsey County, Minn.*

Indorsed: Amended answer. Filed March 11, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

Indorsed: Ent. Case No. 12. U. S. circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific R. R. Co., defendant. Amended answer. Filed March 11, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Jno. C. Bullitt, Jr., and Tilden R. Selmes, attorneys for defendant, St. Paul, Minn.

United States Circuit Court, District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1891.

MARCH 3D, 1891.

Pleas before the circuit court of the United States of America for the fourth division in and for the district of Minnesota, at a statute term of said court begun and held at Minneapolis, pursuant to the act of Congress on the first Tuesday in March, being the 3d day of March, A. D. 1891.

Present: Hon. R. R. Nelson, Hon. O. P. Shiras, judges; Eugen G. Hay, U. S. dist. attorney; J. C. Donahower, U. S. marshal; Oscar B. Hillis, clerk.

The court was duly opened and proclamation made.

UNITED STATES OF AMERICA, *Eighth Circuit.*

In my judgment, the public interests require the designation and appointment of a district judge within this circuit to hold a district and circuit court in the place or in aid of the Honorable Rensselaer R. Nelson, United States district judge for the district of Minnesota:

I do, therefore, by these presents, designate and appoint the Honorable Oliver P. Shiras United States district judge for the northern district of Iowa, to hold the March term, A. D. 1891, of the circuit and district courts, or either of them, at Minneapolis, in the district of Minnesota, in place or in aid of the Honorable Rensselaer R. Nelson, judge of said last-named district.

Given under my hand at Little Rock, this fourteenth day of February, A. D. 1891.

HENRY C. CALDWELL,
*United States Circuit Judge, Eighth Circuit.*

Term Minutes, March Term, A. D. 1891.

MARCH 11TH, 1891—Wednesday Morning.

Court opened pursuant to adjournment.

Present: Hon. O. P. Shiras, judge.

H. W. NICHELS
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY. } Case No. 12.

Before Judge Shiras.

This cause being regularly called for trial the plaintiff appears by his attorney, F. D. Larrabee, and the defendant by its attorney, Tilden R. Selmes.

Thereupon upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit:

John Kreutzer, J. Q. A. Nickerson, H. J. Yetter, John G. Frazer,

Archibald McCullum, W. H. Cross, N. N. Ostrom, Charles H. Mix, C. H. Chester, J. D. Hawkins, Samuel Truax, James W. Palmer—twelve good and lawful men who are duly sworn to try the issues joined, and the trial of said cause is proceeded with as follows:

16 H. W. Nickels was sworn and examined on his own behalf.

Thereupon upon motion of plaintiff's attorney it is ordered that leave be, and the same is hereby granted complainant to amend his complaint; and upon motion of defendant's attorney it is ordered that leave be, and it is hereby granted defendant to amend its answer.

H. W. Nickels is sworn and examined on his own behalf.

Joseph Perusse is sworn and examined on behalf of plaintiff.

And here the plaintiff rests.

Thereupon defendant's attorney moves the court to instruct the jury to find a verdict for defendant; said motion being fully argued is duly submitted, and the court being fully advised in the premises, it is by the court ordered that said motion be, and the same is hereby overruled and denied.

Tilden R. Selmes opens the case for defendant.

Stephen Washington is sworn and examined on behalf of defendant.

C. C. Smith is sworn and examined on behalf of defendant.

M. E. Colbert is sworn and examined on behalf of defendant.

J. A. Jaayes is sworn and examined on behalf of defendant.

A. T. Richmond is sworn and examined on behalf of defendant.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceeding- herein be, and they hereby are postponed until tomorrow morning at ten (10) o'clock.

Ordered that this court do now adjourn until tomorrow morning at ten (10) o'clock.

A true record.

Attest: OSCAR B. HILLIS, *Clerk.*

Term Minutes, March Term, A. D. 1891.

MARCH 12TH, 1891—Thursday Morning.

Court opened pursuant to adjournment.

Present: Hon. O. P. Shiras, judge.

H. W. NICKELS
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY. } No. 12.

17 This day again come the parties herein by their respective attorneys, also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:

A. M. Brown is sworn and examined on behalf of defendant.

Charles S. Baxter is sworn and examined on behalf of defendant.

And here the defendant rests.

H. W. Nickels is recalled and further examined on his own behalf.

G. W. Weisert is sworn and examined on behalf of plaintiff.

M. Gibborns is sworn and examined on behalf of plaintiff.

Joseph Perusse is recalled and further examined on behalf of plaintiff.

And here the plaintiff rests.

Tilden R. Selmes sums up the case for defendant.

F. D. Larrabee sums up the case for plaintiff.

The court instructs the jury and they retire to consider of their verdict.

After due consultation concerning the same and being fully advised in the premises, they find and return into court by their foreman their verdict in words and figures as follows, to wit:

"We, the jury, find for the plaintiff in the above-entitled cause and assess his damages at the sum of five thousand ($5,000) dollars.

CHARLES H. MIX, *Foreman.*"

March 12th, 1891.

It is therefore considered, ordered and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the aforesaid sum of five thousand ($5,000) dollars, so found to be due by the jury, besides his costs and disbursements herein to be taxed, and that he have execution therefor.

Thereupon, upon motion of defendant's said attorney, it is ordered that execution herein be and the same is hereby staid for the period of forty-two (42) days from date hereof.

No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* N. P. R. R. Co., defendant. Copy of record of trial. See Term Minutes, vol. I, pp. 61, 62, 63 and 64.

18 In the United States Circuit Court, District of Minnesota, Fourth Division.

W. H. NICKELS
*vs.*
THE N. P. R'Y CO.

It is hereby stipulated that the clerk may, when costs are to be taxed, tax and enter as part of judgment the following costs in favor of plaintiff, to wit:

| | |
|---|---|
| (1) Marshal fees, as shown by return, viz..... | $2 20 |
| (2) Witness fees..... | 6 60 |
| (3) Statute costs..... | 20 00 |
| (4) Clerk's fees to be added by clerk, *i. e.*..... | 14 40 |

Clerk may tax costs without notice to either party.

F. D. LARRABEE,
*Attorney for Plaintiff.*
TILDEN R. SELMES,
*Attorney for Defendant.*

Dated M'ch 13, 1891.

Indorsed: Ent. case No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Co., defendant. Stipulation for costs. Filed March 16, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

Requests for instruction on part of defendant.

The court instructs the jury to bring in a verdict for the defendant.

The court instructs the jury that if they believe from the evidence that the escape of steam from the hole when the piston works, if steam did escape therefrom, was the proximate and immediate cause of the accident, they must bring in a verdict for the defendant.

Indorsed: Ent. No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Co., defendants. Requests. Filed March 12, 1891. Oscar B. Hillis clerk, by C. C. Webster, deputy.

In the United States Circuit Court in and for the District of Minnesota and the Fourth Division Thereof.

H. W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

*Petition for a New Trial.*

Now comes defendant in the above-entitled cause and petition
19 tions the court that the verdict rendered herein be set aside and that a new trial of said cause be granted upon the following grounds:

First. That the verdict is not justified by the evidence and is contrary to law.

Second. Errors of law occurring at the trial and duly excepted to by the defendant.

Third. Excessive damages which appear to have been given under the influence of passion and prejudice.

And defendant further petitions that the stay of proceedings which has heretofore been granted in said cause be continued until said petition for a new trial is heard and determined.

Dated April 1st, 1891.

JOHN C. BULLITT, JR.,
TILDEN R. SELMES,
*Defendant's Attorney.*

St. Paul, Minn.

Indorsed: Ent. case No. 12. H. W. Nickels *vs.* N. P. R. R. Co. Petition for a new trial. I hereby certify that I have read the within petition for a new trial and hereby allow the same to be filed, and order that all proceedings therein be staid until the determination of said petition for a new trial. O. P. Shiras, judge. Filed April 6, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

In the United States Circuit Court in and for the District of Minnesota, Fourth Division.

H. W. NICKELS
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY.

*Motion for New Trial.*

SHIRAS, *J.:*

The main ground urged in support of the motion for new trial in the above cause is that the court should, in pursuance of the request of defendant, have instructed the jury to find for the defendant on the ground that it was clearly made to appear that plaintiff had by negligence on his part aided in causing the accident of which he complains.

The argument is that the plaintiff must have seen or was negligent in not seeing that the standing car had double dead-woods upon it.

He testifies that he did not know it. The accident happened after dark; and it is not clear that, under all the circumstances, this question was not for the jury to consider and decide.

If plaintiff's arm had been crushed whilst he was attempting to make the coupling, there would be great and, perhaps, unanswerable force in the position of the defendant; that under the rules of the company plaintiff was not justified in making the attempt to couple until he had ascertained the make-up of the standing car.

The evidence, however, was to the effect that immediately after plaintiff went between the cars to make the coupling, the steam from the defective engine came up between the cars, obscuring the vision of plaintiff, who thereupon abandoned the effort to make the coupling and endeavored to get out. In doing so he threw up his hand and it was caught between the dead-woods. It cannot be said that plaintiff was negligent in abandoning the effort to make the coupling under the circumstances. Whether he was negligent in throwing up his hand was for the jury, and not for the court, to determine. If he was bound to know the make-up of the standing car, according to the contention of defendant, and must therefore be assumed to have known it, it does not follow that he would not have gone between the cars for the purpose of making the coupling. On the contrary that would have — his duty. In being between the cars, he was where his duty called him to be. If the steam had not rushed up and blinded him, it is entirely possible he could have made the coupling in safety. When that occurred he endeavored to get out from between the cars, but failed to escape in safety. Under this view of the case it was for the jury to determine whether he was guilty of negligence.

To justify the court in directing the verdict for defendant, it would have been necessary for the court to assume the correctness of defendant's theory of the case, to wit:

That in fact the plaintiff did not attempt to get out by reason of

the escaping steam, but attempted to make the coupling, without ascertaining the make-up of the standing car, and his hand was caught between the dead-woods of the cars, because he did not place his arm in the position required when coupling cars of this construction.

It is entirely possible that such was the fact, but the plaintiff's testimony was to the contrary, and hence there was presented a disputed question of fact that required the submission of the matter to the jury.

If, therefore, the court was justified in submitting the issue of fact to the jury, the verdict settles the issue.

21 The motion for new trial is therefore overruled.

Indorsed: Ent. No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Company, defendant. Order overruling motion for new trial. Filed Aug. 6th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

H. W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

*Bill of Exceptions.*

This action came on for trial at the March term of this court for 1891, at Minneapolis, Minnesota, on the 11th day of March, A. D. 1891, and the following days, before O. P. Shiras and a jury.

The counsel for plaintiff, to maintain and prove his case, called as a witness, Harry W. Nickels, who, having been duly sworn, on his own behalf, testified as follows:

The plaintiff, H. W. NICKELS, testified as follows:

I am the plaintiff in this action; come from Minnesota; was hurt in Montana; went to Montana May 26th, 1889; lived there seven or eight months before I was injured; lived there ten days after receiving injuries, then went to Minneapolis; lived at Glendive, Montana, all last summer; now claim Minneapolis as my home; came here the 7th day of January; received my injuries December 16th, 1889, while employed as switchman for The Northern Pacific Railroad Company, the defendant in this action; had been in the employ of said company prior to time of accident, about seven or eight months; was employed in this yard as switchman three nights before I got hurt; was employed by Mr. Perusse, yardmaster; had been braking on the road for the Northern Pacific for several months prior to the time I went to work in the yard, on the Yellowstone division, the termini of my run being from Glendive to Billings; my duty as switchman at Glendive was making up trains, coupling and uncoupling cars and throwing switches; was

working under Mr. Perusse, yardmaster, whose duty it was to tell the men what to do and to give us orders; went to work at night-time, got hurt between 8 and 9 o'clock; it was dark, dark enough so you couldn't see anything without a lamp; carried my
22 lantern, which was furnished by the company; Mr. Perusse, the yardmaster, was present when I got hurt, the crew consisted of three men, two helpers, and the yardmaster, I being one of the helpers; there was one other switchman besides myself, and the men upon the engine; had one switchman in the yard; was coupling two box cars together when injured; the cars were foreign cars, both of them; don't believe I know what company they belonged to, but know they were foreign cars, two Pennsylvania cars; the cars owned by the Northern Pacific Railway Company have got one single dead-wood right above the drawbar; the two foreign cars I was called upon to couple had cast-iron dead-woods about eight or ten inches square on each side of the drawbar, what we call double dead-woods or man-killers, they are double dead-woods; the double dead-woods are cast-iron dead-woods about eight or nine inches above the drawbar, and about 18 inches on each side; they are about that square (indicating eight or nine inches); when two cars with those double dead-woods upon them approach each other they come close up together; they will touch each other when the drawbars touch; as quick as the drawbars touch the dead-woods touch; I knew that one of these cars had double dead-woods upon it before I went in to make the coupling; about the other one I knew nothing; I was ordered to go in and make this coupling by Mr. Perusse, the yardmaster; I received my injuries this way: We had an engine with one of the crew; Mr. Perusse and myself walked down by the side of these cars to where the train was made up standing still, and just as they got about six or seven or eight feet, somewhere along there, apart, I went in and got hold of the link, and just as the cars were pretty near together a big flood of steam came out, and I started out and my arm was caught and mashed; my arm was caught by these man-killers or dead-woods; the moving car was going west, the track running east and west, the engine being on the east end, headed west; I entered on the left-hand side to make the coupling; the link was in the moving car; I had the lantern in my left hand, and reached to get hold of the link with my right hand; when they got pretty near together this steam came starting out and I let loose of the link and raised my hand and these dead-woods caught me right by the wrist; I got loose to get out without making the coupling.

The iron drawbars on a car are about as high as your waist; it is necessary to step in between the rails on the road-bed to make the coupling, and I stepped in between them. If I were to reach in and step in between the rails, reach in with my right arm and take hold of the link, my arm would be at the end of one of the dead-woods near my shoulder; just as soon as the steam came in I started out; the steam blinded me so I could see nothing; after I dropped
23 the link and started to get out I threw my arm up and turned around to run out and the dead-wood caught me;

I did not see the double dead-wood upon the standing car before the injury; the lantern that was furnished me at the time and which I was using was a common lantern for railroad use; notwithstanding the lantern being in my hand steam enough came in there to obscure my sight of everything; if it had not been for the steam I don't believe you could see much more than the size of the drawbar by the light of the lantern; it would make a kind of a flicker at the end of the car, and that is about all it would make.

Cars with double dead-woods can be safely coupled if there is nothing to obscure the light so that the brakeman can see the condition of it, by reaching under the bar and dropping your hand down; you can't couple over them, the draw-bar is too far under; I couple under them; after they are coupled you must drop you- hand down in order to get out; I know the condition of the engine that was pushing this car as to allowing steam to escape; the steam that flooded in there came from the piston and the cylinder cocks, I guess, both of them; I have worked with this same engine three nights before I was injured; it had been used there the three preceding nights; the steam was escaping not only from the steam or cylinder cocks, but from the piston. The piston goes into the cylinder at the end; the steam cocks on the cylinder would not close; the result was that steam escaped when they were working steam; that is, all the time when they would be working steam. When an engine is in proper repair the steam cocks are closed; you can't see any steam at all escaping.

The escaping steam came from both cylinders of the engine; the engine had been in that condition during the whole three nights that I worked there with it; I made complaint to Mr. Perusse, the yardmaster; I told him the engine was not fit to work with, and I would not work with it unless he got it fixed; he told me he was going to see if he couldn't get it fixed; that was on the night of December 14th, 1889; on the night just before I got hurt I told him that I would not work with it any longer; I told him it was not safe and somebody would get hurt; he told me they were going to get a new engine there; the second time I spoke to him about it he said they were going to get a new engine there in a short time.

I am 25 years old now; when injured was earning $60 per month; my health was pretty fair, pretty good health; I am single; it was eleven days after I received the injury that my right arm was amputated; my arm was amputated about 4 or 5 inches below the elbow.

24 Cross-examination:

The first work I done for a railroad company was in 1879, about 11 or 12 years ago; I went to Glendive May 12th, 1889; had worked for several roads prior to that time; worked for the Duluth, the St. Paul and Duluth, and the M. & L., the second road being the Minneapolis and St. Louis; worked in the yards for them and worked as switchman on various roads running into St. Paul and Minneapolis; could

not say how long I worked for these roads prior to that time; I then went to Glendive to go railroading again; did not go to work at railroading as quick as I got there; I did nothing there from May 29th to June 26th, then went to work in the night yard at Glendive; worked there 20 to 30 days and then quit; then went into the night yard; just shifted from breaking on the road to working in the night yard; I was at Glendive about 25 days and then went onto the road, and then about the middle of December, four or five days before this accident, I went to work in the night yard again in the same position I had before in June; the night of the accident I went to work at 7 o'clock; the first work I did was to put a caboose on No. 1; at Glendive we have a west-end and an east-end yard; I was working in the east end all the evening; was making up train No. 14; first track in the yard is No. 1, which is the north main track; then there are five switch-tracks south of the main track, four switch-tracks, five tracks altogether, numbered 3, 4, 5, 6; first work I did that night was to put a caboose on second No. 1, the passenger train; the tracks which I have named south of the main track were freight tracks; then started to make up train 14; went down on track 4 and got 13 cars; we put eight of them on No. 5 and four of them on No. 6; then we went down to couple up this car to shove it in on 5 to clear, and then I got pinched; we first pulled 13 cars out of No. 4, put eight of them on No. 5 and four on No. 6, leaving one car and the engine; in making the first cut we pulled out these 13 cars and took them along; I turned the switch and turned the switch again and let them onto No. 5; I stood there and saw they wouldn't have room to clear the way they went and I throwed the ground switch for No. 6; I am not sure whether it was a ground switch or not; then put four cars on No. 6, and then we backed up on 5 again and threw the switch again.

Mr. Perusse and myself walked down alongside of the cars; Mr. Perusse gave the signal to go in there and I stood by him when he did it; I walked along by the side of that car right beside Mr. Perusse, on the right side of him, between him and the cars on his right; the engine was headed west toward the cars and was coupled at the front of the engine to the cars; I stepped in front of this car when she was six or eight feet from the still car; I took hold of the link of the moving car; I didn't touch the pin; but coupling cars generally you take the link of the moving car; there is a link here and the pin which fits into it, and the other car has simply a pin; when you leave a car you leave the pin standing up in the hole, and when you come to make the coupling you take this link and you place the pin in the other car so that it will fall, and then when this link comes in here you raise it up and direct it this way into the slot of the other drawbar, and when the cars come together the pin falls into the link; the first thing you do is to fix this pin in the stationary car so that it will fall; then the next thing to do is to take this link and guide it in, and as it goes in when the cars come together the pin on the stationary car will drop in. In double dead-wood cars you have to get down this way and guide the link in when you want to make a coupling, and

reach over with your left hand this way; that is the only way you can make it; the safest way to make it is with a stick. As I followed down by the side of this car steam was escaping. I didn't pay any attention to it as I went down; we had our backs to it; it was not in front of us; he couldn't see the signal when he got the signal to stop; I did not give the signal to stop; Mr. Perusse did; I did not see the steam when he gave the signal to stop; I saw it when I went in between the cars; there was no steam when I went in between the cars; when I went in the cars were six or eight feet apart; when I went in they were moving about as fast as a man could walk, about four miles an hour.

Suppose this table was the moving car and this other table was the stationary car; I stepped in here between the two cars when this car was about six or eight feet from the stationary one, and reached down and got hold of this link; they were pretty near together when the steam came in there; the steam was not in there when I caught hold of the link; when I got hold of that link I tried to look at the end of that other car; I saw the end of the car; I did not see it clearly because I did not have light enough; I had a lantern with me and the steam poured in after I caught hold of that link when the cars were pretty near together, about 18 inches apart, somewhere along there; about 18 inches to two feet when the steam came in; when the steam came in I dropped the link and started out; I raised my hand and the dead-woods caught my wrist; I had not fixed the pin in the stationary car; my hand was crushed right flat. I understand and know what double dead-woods are and have seen them; they are cars that were used on the Pennsylvania roads and the Lehigh Valley; they are used to prevent the drawbars from being crushed in; they are—what I was always told they were for was to keep from breaking the drawbars; I
26 have seen them in this yard and in various yards. I noticed when I stepped in there that this moving car had a double dead-wood; that is something you would notice instantly if you went to work coupling a car. I don't know anything about how clear they were; they were just like a projection on this desk; you can tell them if you walk along there. I know nothing about the different rules of the Northern Pacific Railroad Company; never saw one. (Paper shown witness.)

That is my signature, yes, sir; that is my handwriting. I signed that paper; I did it at the time while I was in the employ of the company; it is called a personal record; I believe that is what they call it.

Said paper is offered in evidence as part of the cross-examination of this witness and is received without objection upon the part of plaintiff, is marked "Exhibit 1" and made a part of this record.

Direct examination under amended complaint:

The cylinders of that engine in addition to cylinder cocks remaining open all the time, were defective as regards escaping steam in that the piston was blowing; I suppose it wanted packing. The

result was that the steam was blowing out of the piston. The piston-rod is a solid rod and enters the end of the cylinder through a hole; the steam comes out of the same hole that the piston works in. If the engine was in proper repair and the cylinder was in proper repair there would be no escaping steam from the cylinder; more steam would escape when they were starting than when they were running regularly; stopping would be all right if you give her steam for to stop; the quantity of steam that would escape when stopping the engine as compared with what would escape when working regularly would be about the same; if the engineer would reverse his engine when undertaking to stop, quite a lot of steam would blow; the wind that night was from the east; I was in a direction west from the engine.

Cross-examination:

I can't say what I know about the construction of an engine; I know something about how the piston-rod works, and know what the packing is in it; who puts the packing in depends upon what kind of packing they have in; I know what is necessary to put in there; I don't knew exactly how much packing; I know what the effect is when there is no packing there; steam was escaping from that at that time; principally from that and the cylinder cocks; most steam was escaping from the cylinder cocks; there was a good deal escaping from this piston; the escaping steam from the cylinder cocks alone would have been sufficient to have blinded
27 me; escaping steam from the piston would help out; I can't say whether if the cylinder cocks had been all right there would have been sufficient steam from the piston alone to have blinded me; I can't say hardly whether it was escaping about equally from both or not; I discovered there was steam escaping from the piston the nights when we started to work there; I discovered about a couple of nights before that; about a couple of nights before I was hurt I discovered that steam was escaping from the piston and from the cylinder cocks also; I don't know when I first discovered it was escaping from the piston. I told Mr. Perusse if we worked with the engine that way somebody would get hurt; that is all I told him; I told him I wouldn't work with it; I told him I wouldn't work with it 15 or 20 minutes before I was hurt; I told him I would go on the foot-board and work with it; I told him what was the matter with the engine; I told him steam was blowing so that a man couldn't see. All the time I told him about the steam blowing from the piston I noticed the blowing from the piston at that time. Perusse told me to keep on working with that engine and that he would have a new engine there in a short time; he told me that two or three times, and he also told me that about 20 minutes before I got hurt; I started to work about 7 o'clock and I got hurt between 8 and 9 o'clock. To my knowledge we had 13 box cars switched that night when I got hurt. The engine was attached to a car, and I followed down close enough so that you could speak to a man that was in it; they stopped when I made that

switch; they shoved up on this and came back and I threw the switch over onto 5, and then they went down on 5. They made a stop after they came to 5, after they struck, I guess; I didn't make any signal at all. After I threw the switch I started to go up the track; I walked to where Perusse was standing, somewhere west of the switch, a short ways, I can't say how far, about a car or two; I walked past this car on my way to Perusse, then I walked down past him until I got to the other cars, three or four car-lengths; Perusse was not 50 feet from the switch; these other cars were on 5. They wouldn't clear any more cars; there was not room to clear any more cars, and we were going to shove them down; we were going to make a coupling to shove them down; I didn't say I went in there to pull them out; we went down there to shove them down; originally we drew out 13 cars; threw eight cars in on 5 and then 4 and 6, and came back with one car and put it on 5, and that is where I got hurt. When we put these eight cars on No. 5 we left them so that they would clear; then we had to put five or six more cars there; there was not room for another car there; this car did not reach the switch nor get over the switch before the engine
28 got over the switch; we came out of this and went down on No. 5 and then the cars wouldn't clear and we had to shove them down to clear these cars we were going to leave there; they couldn't have been more than about three car-lengths over the switch; well, about two car-lengths; I didn't measure the distance. When I got there I went up to Mr. Perusse; Mr. Perusse cut the engine off and we went down the main track and went to the doctor's office; I walked to that engine; Mr. Perusse spoke to the men there; I didn't speak to them; Mr. Perusse cut the engine off the train, then they got onto the main line and went down to the doctor's office. That coupling was not made by these cars coming together there; I didn't see it; I don't know whether it was made or not; I didn't say anything to Dr. Duncan about how this accident occurred; I went away from there in ten days to Brainard. I never said anything about the way the accident occurred; I know Dr. Richmond; I never said to him that the accident occurred through my carelessness; I never said anything to any one about how this accident occurred; I did not say anything the night I got hurt about the steam; I talked to Mr. Perusse at that time about the way the accident occurred; I didn't tell him anything; I was asking him who put the engine in the house and saw the things; I asked him whether they put the engine in the house after I got hurt; I didn't say anything to him about the accident; he said nothing to me about it. I understood your question was about the engine after I got hurt and not about the accident; I didn't say anything to Mr. Perusse about the accident. I know he made a report of it because he told me he made a report; at the time he told me he made a report I did not have any conversation with him with regard to the way the accident occurred; he didn't ask me how the accident occurred, and I didn't explain it.

Nobody ever asked me about it and I didn't say anything about it. I remember signing this paper (marked "Exhibit No. 1," and re-

ceived in evidence); it was given to me; I wrote it out in my handwriting; I didn't read a word of these answers; I copied that off another paper that my partner had; my partner that was with me about that time; he made this out and I copied it off; it is true that I was born at Fond du Lac, Wisconsin, and that I was 23 years of age at the time of this accident and was single, and that I had worked for the Minneapolis & St. Louis Railroad Company, for the St. Paul, Minneapolis and Manitoba Railroad Company and for the St. Paul & Duluth Railroad Company; I did not use a stick or a pin to make the coupling that night. I said that I worked for the Northern Pacific Railroad Company all the time between the date of that signature of that instrument, that personal record
29 and the time I was injured; I worked all the time on the Yellowstone division, either on the roads or else in the yard at Glendive.

The counsel for plaintiff, further to maintain his case, called JOSEPH PERUSSE, who, being duly sworn as a witness, testified as follows:

I reside in Minneapolis and work as a switchman here in Minneapolis; I have been a switchman for about 13 years; my duties are to couple cars, cut them off and throw switches. I was working for the Northern Pacific Railroad Company at Glendive, Montana, in December, 1889, as night yardmaster, and knew the plaintiff, Harry Nickels, at that time; he was working for the Northern Pacific Railroad Company as a switchman on the night crew; I employed him; he was hurt about 8.15 in the evening; it was dark; he had been working for the company in that capacity three or four nights; I had been working for the Northern Pacific Railroad Company for about 14 months, and had been yardmaster at Glendive for about a year before the accident. I was present when Nickels was injured; about a half car-length from him; no one besides me was near him; I did not notice him when he got hurt, but saw him a moment afterwards; I can't say just exactly what he was doing when he got hurt; I saw him go in between the cars; I can't say about what he did in there; I did not see it; I saw part of his hand there and any amount of blood and flesh; he was working under my orders; we were making up an east-bound train; he was hurt on track No. 5. (Map introduced in evidence showing the tracks in east end of the yard. Marked Exhibit No. 2.) The accident happened in the east end of the yard; track No. 2 is not shown on the map, being at the west end of the yard; tracks shown are main track, being the northerly track, and tracks numbered 3, 4, 5 and 6 being side tracks; track No. 5 connects with track No. 6 and track No. 4 and with roundhouse; then there is a three-throw switch; plaintiff was working on tracks 4, 5 and 6 when he was hurt; we were making up train No. 14; at the time plaintiff got hurt we were shoving in the cars on No. 5, to clear No. 6; there was one car attached to the engine at that time; we shoved eight first and then shoved four. Train No. 14 came in from the west and we were making her up to send her

east; first, I, myself, cut off the caboose from the hind end; then we dropped eight cars on No. 5; then we had four cars of coal, and dropped them onto track No. 6, the usual track for that purpose; then we shoved the other cars onto No. 5; at the time plaintiff was injured we were going to shove the eight cars on No. 5 down with the one car; the plaintiff was one car-length from the engine when he was hurt, the engine being headed west. Both the cars the plaintiff had to couple were foreign cars, Union Line cars, I believe, and both had cast-iron double dead-woods; I was about 15 or 20 feet, not over 20 feet from plaintiff when he got hurt, with my back to him toward the engine, about the middle of the car; Nickels had just thrown the switch and let the engine and car in on No. 5 to shove it in clear after we pulled out No. 6. I was from one and a half to three car-lengths from the east switch which leads from 6 to 5, when he threw this switch I was standing about opposite to the frog on No. 6, west of the switch and I walked down by the side of the plaintiff before he went in to make the coupling as the engine pushed the single car down, going four to five miles per hour, just about as fast as a man could walk. I signaled the car to stop when the plaintiff was between the cars; the cars were eight or ten feet apart when the plaintiff went between them; there was lots of steam escaping from the engine at the time; the wind was blowing from the engine towards the plaintiff; it was a pretty cold night and steam and smoke both blew towards the plaintiff; I worked with this engine all the time I was working in the yard. The packing around the piston and cylinder cocks were not in good condition; you could not shut the cylinder cocks and the piston was blowing; I suppose it wanted packing; the engine had been in that condition 10 or 15 days, 10 days anyway; there was steam enough escaping that I could not see the engine; could not see the men on the engine; steam and smoke in quite a volume both blew down towards the ground in between the cars where the plaintiff was. The witness was then asked:

Q. Suppose an engine was in proper repair, without any defects in the cocks or in the packing of the piston-rod does it allow steam to escape?

Objected to; incompetent; no foundation having been laid.

The COURT: I think there is sufficient to show that he has some knowledge of engines from his testimony.

Objection overruled.

Defendant excepts.

Q. You may state, would an engine in proper repair with the *the* cylinder cocks all right and the packing about the piston all right, would it permit steam to escape?

A. No, sir; it would not.

Q. How much time have you worked around locomotive engines?

A. About fifteen years.

Q. How about this engine prior to the time that you say she be-

came out of repair, did that engine emit steam; you say she had been out of repair for ten or fifteen days?

A. She was pretty good before that; she was not in good shape all the time either.

31 Q. Did the plaintiff say anything to you about the condition of this engine at any time before he was hurt?

A. He did; about two nights before he was hurt and about five minutes before he was hurt.

Q. What?

Objected to.

A. He told me the engine was not safe to work with, and I told him I knew it; I told him I couldn't help it and I had reported it and they had been promising us a new engine; I told him he would have to work with her; I told him he would have to get along with her.

Q. Before the plaintiff spoke to you had you complained of the engine?

A. Yes, sir.

Q. To whom?

A. Both the engineer and the master mechanic in the office.

Q. Was the division headquarters at Glendive?

A. Yes, sir.

Q. Did they have a repairing shop there?

A. Yes, sir.

Q. Who had charge of the repairing shop?

A. Mr. Brown.

Q. What position did he hold?

A. Master mechanic.

Q. You say you had complained to him about the condition of the engine?

A. Yes, sir.

Q. What did he say?

A. He told us he expected a new engine, and he was going to have a new engine, and we would have to try and get along the best way we could.

Q. After this plaintiff spoke to you some two or three nights before the injury to him; did you complain about that again?

A. I did.

Q. What did you say?

A. I told him the men were kicking about the engine.

Q. What did he tell you then?

A. He said we would have to try and get along until we could get another engine.

Q. Did you speak to the plaintiff about it after you had said this?

A. Yes, sir.

Q. What did you say to him?

A. I told him just what was told me.

Q. You spoke to him and told him just what was told you by the master mechanic?

A. Yes, sir.

Q. How was the condition of the steam about you at the time of the accident?

32 A. I couldn't see the fireman at all. I couldn't see him to give him the signal and he couldn't see me on account of the steam. The plaintiff had not seen the standing car before he went down there to make the coupling; he did not have a chance; I cut the cars off.

Cross-examination:

I made complaint to the master mechanic and he said I would have to get along with that engine until I could get a new one; that was just exactly what he said; I cut off the string of eight cars which were put on track No. 5. I noticed these cars had double dead-woods on them; there was a double dead-wood car, then a single dead-wood car, and then these four coal cars, and I cut off the single dead-wood car and the four coal cars, leaving the double dead-wood car on track No. 5; I noticed it was a double dead-wood car when I left it there; when Nickels threw the switch just before the accident I stood at the frog of track No. 6; smoke and steam was blowing right along; it blew all the time; I could not say that steam was coming up when he went in to make the coupling, but it had been up to that time. The cars came together slowly; they did not come together hard. I had no conversation with Nickels as to how the accident happened; I took Nickels to the doctor's office and then sent engine to the round-house. I left the employ of the company July 12th.

Redirect examination:

I do not know whether there was any steam between the cars when the plaintiff went in there or not because I was not at that part of the car; I was about the middle of the car; the steam was blowing right down and could not see the end of the train at all; I cannot tell you whether there was any more steam coming from the engine after he went in there than there was before he went in; I was standing at about half a car-length from him, about 14 or 15 feet from the end of the car he was going to couple; I did not read the switch-list over much because I was watching him; the engine was out of order and in bad shape to work with, so I was watching him; when the engine first started it necessarily blew more steam; the same amount of steam goes out all the time, I suppose; that is, while she is working steam.

Plaintiff rests.

Defendant makes a motion to have the court instruct the jury to bring in a verdict for the defendant, which motion was denied. Thereupon the defendant excepts to the ruling of the court.

33 Defendant to support the issues on its part calls STEPHEN WASHINGTON, who being duly sworn, testifies as follows:

I am a locomotive fireman and have been employed in that posi-

tion for the Northern Pacific Railroad Company about three years; was working as fireman on switch-engine No. 128 in the Glendive yard at the time plaintiff was injured; this was the switch-engine doing the work in the Glendive yard at the time Nickels was injured; we were making up train No. 14; at the time of the accident I think we were on track No. 5; I think we had from five to eight cars in front of the engine pushing them up track No. 5, but cannot swear to that; Nickels must have been five or eight cars in front of the engine at the time he was making the coupling when he was injured; just before the cars came together Perusse signaled me to stop the engine, and I signaled the engineer; there was steam escaping from the cylinder cocks, but there was no steam escaping from the piston-rod at this time that I remember of, and I never heard any complaint of any steam escaping from the piston-rod then or at any time; I am not positive as to the number of cars ahead of the engine.

Defendant thereupon called C. C. SMITH, who, being duly sworn, testified as follows:

I am a locomotive engineer in the employ of the Northern Pacific Railroad Company and have been in their employ about eight years; was running switch-engine No. 128 at the time of the accident to Nickels, the plaintiff herein; the accident happened about 8 o'clock in the evening; there was no steam escaping from the piston-rod at the time Nickels was hurt; I never made any complaint or had any complaint of steam leaking out of the piston-rod; steam was escaping that night from one, that is, the left-hand cylinder cock, but no steam was escaping from the other; I had reported it previous to that time on the book for that purpose; from the position the engine was in at the time of the accident I am satisfied there was no steam escaping from either cylinder cock or piston-rod; I do not remember how many cars there were between the engine and Nickels at the time he was injured (but my opinion is there were several, I think five or six). The piston is a rod which connects with the spider inside of the cylinder, which runs back and forth from the stuffing box where the packing is put; this stuffing box is usually filled with hemp for the purpose of keeping the piston-rod tight; it is the duty of the engineer to put it in when necessary; it is usually put in in one of two
34 ways; sometimes it is rolled up and put in the stuffing box and tightened up, but sometimes it is braided; it depends a good deal upon the quality of the hemp; poor hemp will last longer if it is braided, but with good hemp it is not necessary; you have to put it in from time to time as it is necessary in the same way as you oil your machine, and the hemp is furnished the engineer for that purpose; it is as much his duty to pack the piston-rod as it is to oil the engine; the piston-rod was properly packed that night and no steam was escaping from it; the only complaint that I ever made about the engine was of the left-hand cylinder cock; immediately after the accident the engine was taken to the round-house and the cylinder cock fixed; there would no steam escape

under the circumstances from the cylinder cock or piston-rod at the time of the accident; to my knowledge there was no chance for any steam to escape at that time; but I was not watching the cylinder cocks. I was running the engine nights, week about, that is, half day and half at night.

Defendant called M. E. COLBERT, who, being duly sworn, testified as follows:

I am a locomotive engineer in the employ of the Northern Pacific Railroad Company, and was working in the Glendive yard in December, 1889, running switch-engine No. 128, one week with the day crew and one week with the night crew; at the time the plaintiff was injured I was running the switch-engine in the daytime; there was no steam escaping from the piston-rod; it was packed frequently; when I was working in the daytime I used to pack it at least twice a week; I got off the engine between 6 and 7 o'clock; the evening Nickel was hurt the piston-rod was not leaking.

There was evidence introduced tending to show that this left-hand cylinder cock had been out of order and had been reported as leaking and that a new valve had been put in, but the stem of the valve was a little too long and would not let the valve close perfectly, so that when the engine worked some steam escaped; after this accident the engine was taken to the round-house and the stem filed off $\frac{3}{16}$ of an inch, which allowed the valve to shut.

Thereupon defendant called as a witness A. M. BROWN, who, being duly sworn, testified as follows:

I am master mechanic of the Northern Pacific Railroad Company at Glendive, Montana, and was master mechanic during the year 1889, and during the entire month of December. I was well
35 acquainted with Mr. Perusse; I never had any conversation with him relative to engine No. 128; I never made any promise of any kind in regard to repairing the engine or furnishing a new engine during the month of December, 1889. Perusse did make a complaint in regard to engine prior to December, 1889, to the effect that the engine was not heavy enough for the work; I made no promises whatever in regard to changing the engine; Perusse never at any time made any complaint in regard to the condition of the engine; the engine is still in the yard at Glendive; I never contemplated having a new switch-engine in that yard, and it was not possible to get one; I never expected at that time or since to have a different switch-engine than the one we had there; it is the duty of the engineer to attend to *to* the packing of the piston-rod; the packing is furnished the same as oil is furnished to the engineers, on their order.

Defendant thereupon called C. S. BAXTER as a witness, who, being duly sworn, testified as follows:

I was a train-dispatcher, working for the Northern Pacific Railroad Company at Glendive, Montana, during the year 1889, and in

December of that year. I am familiar with the rules of the railroad company in force at that point at that time and with the Book of Rules.

Thereupon a book is shown witness which he identifies as a Northern Pacific Book of Rules, and is offered in evidence.

Witness further testified that rule No. 25 is the same as rule 25 of Defendant's Exhibit 1. I know such rule to be the rule in force at Glendive, Montana, in December, 1899.

Thereupon defendant rests.

Plaintiff, in rebuttal, called HARRY NICKELS, who, being duly sworn, testified as follows:

Q. What was the custom or habit of employés of the Northern Pacific road at the time you were injured, and prior thereto, while you were in the employ of the company in regard to using a stick or pin in the making of a coupling?

Objected to as immaterial, incompetent and irrelevant.
Objection overruled.
Defendant excepts.

36 A. Never used any. Never saw a man use a stick in my life.

Q. What office- of the Northern Pacific Railroad Company were located at Glendive?

—. Mr. Baxter and Mr. Marsh.

Q. What was Marsh's position?

A. Superintendent of the Yellowstone division.

Q. Was there any other officer employed in the operation of that part of the road than the superintendent, Mr. Marsh, and having control of the operation of that part of the road upon which you worked at Glendive?

A. No, sir.

Witness further testified:

Mr. Marsh's office is upstairs over the depot, the depot is situated right in the center of the yard; in the daytime Mr. Marsh can see the men working on that part of the road; he could see them in the yard in front of the depot about half of the time; he saw them coupling and uncoupling cars without sticks; I never heard him say anything to anybody about using a stick in making a coupling; I never saw a man use a stick in making a coupling in my life; I never was furnished a Book of Rules while in the employ of the company, and never saw one.

G. W. WEISSERT, called as a witness for plaintiff in rebuttal, being duly sworn, testified as follows:

I was in the employ of the Northern Pacific Railroad Company and left their employ about six months ago; I was in their employ about two years as fireman and conductor; it was my duty to

couple and uncouple cars; I was employed in Minneapolis, Minnesota.

Thereupon the plaintiff asked the following question:

Q. What was the custom or habit of the brakeman and switchmen and employés that were called upon, and whose duty it was to make couplings of cars, with regard to the use of the stick to direct the link into the drawbar?

Objected to as immaterial, incompetent and irrelevant.
Objection overruled.
Defendant excepts.

A. I never saw any sticks used in making couplings.

Witness further testified:
I never saw a stick or pin used in making a coupling anywhere while I was in the employ of the company.

37 Cross-examination:

Q. Where were you working in December, 1889?
A. I was on the St. Paul division, between here and Brainerd.
Q. On the road there?
A. Yes, sir.
Q. How far west have you ever worked on the Northern Pacific railroad?
A. No further west than Brainerd or Staples.

Defendant's counsel moves to strike out all the testimony of this witness with regard to the custom and habit of the employés of the Northern Pacific Railroad Company with regard to making couplings.
Motion denied.
Defendant excepts.

M. GIBBONS, called as a witness for the plaintiff in rebuttal, being duly sworn, testified as follows:
I am a switchman, working in Minneapolis for the Northern Pacific Railroad Company; have been working in that position for about one year and four months; my duties are to couple and uncouple cars; it was the habit of the employés of the Northern Pacific Railroad Company in the Minneapolis yard not to use a stick in making couplings. I have never seen a pin or stick used in making a coupling in that yard.

This evidence was all received over the objection of the defendant.

—— JOSEPH, being called as a witness for the plaintiff, being duly sworn, testified as follows:
I was never furnished with a stick and had never saw one used in the yard at Glendive, and that Mr. Marsh, the superintendent at Glendive, saw men coupling and uncoupling cars in Glendive without sticks.

It is admitted that the rules introduced in evidence published by the defendant company applied to the whole road of the defendant company during the whole time that said plaintiff worked for said defendant company, and ever since. Also, that said rules have been published ever since and were first published in the year 1883; that the same were modified in the year 1886 and that the
38 same have been in existence along the whole line of the Northern Pacific Railroad Company from that up to the present time; and that the same were in existence at the time that plaintiff was injured.

The foregoing contains all the evidence adduced at the trial of said cause.

The court, among other things, charged the jury as follows:

"Generally a railroad company has a right to adopt all reasonably and proper rules for the carrying on of its business and for the guidance and control of its employés who are engaged in carrying on the business of the railroad company, and ordinarily the duty and obligation is upon the employés to observe those rules which are enforced in the business of the railroad company in whose employ he may be."

"On the part of the plaintiff it is claimed that the negligence causing the accident to happen to him was in having in use in the yard at Glendive on the occasion named an engine that was faulty in this particular: that steam was allowed to escape and would escape from the cylinder of the engine in such quantities as that it came up between the cars where the plaintiff was called upon to go in between the same in order to make the coupling and that such steam so blinded him as to render him unable to see the condition of affairs so as to act for his own protection, and that in the effort of getting out from between the cars under the circumstances he received the injury which cost him the loss of his arm.

As I have already stated in general terms, the duty existed and was placed upon the railroad company to furnish for use in that yard at Glendive, Montana, a proper switch-engine for the business to be transacted in said yard; or rather, that the railroad company would use ordinary care, as I have already defined it to you, in seeing to it that an engine properly equipped for use was furnished to the employés in that yard for the purpose of doing the switching there.

The first question for you to determine is whether the evidence satisfied you that there was a failure on the part of the railroad company to exercise this ordinary care to furnish an engine that was properly equipped for that business. So in the first place, the question is whether that engine was in proper condition to be used, or whether it was in improper condition to be used. Was it or was it not lacking in any particular? There has been evidence introduced tending to show that the cocks of the cylinder of this engine were in such condition that steam escaped therefrom, and that it was not in the power or within the control of the engi-

neer to prevent the escape of steam from these cylinder cocks when the engine was being used.

39 You have heard the evidence that has been introduced upon that point, and it is for you to say whether the plaintiff has satisfied you by a fair and reasonable preponderance of the evidence that the engine was faulty in that particular. It is also charged by the plaintiff that the engine besides being faulty in this matter of the cylinder cocks, was in such condition that steam escaped from round the piston-rod where the piston-rod entered the cylinder.

You are to determine whether or no the defendant has used ordinary care in having the engine in good and proper condition, and in a safe condition for the use of its employés when they were engaged in the business of switching in that yards at Glendive." * * *

If you find under the evidence as I have already stated that this defect was not the proximate cause of the injury, then that is an end of the case, and your verdict must be for the defendant.

On the other hand, if you find under the evidence that the coming up of the steam between these cars—if you find it did come up—was the approximate cause of the accident, then you will be required to consider and determine the question that arises under the charge of negligence which is made by the defendant railroad company against the plaintiff in this action.

In the first place it is claimed on the part of the defendant that under the rules of the company the plaint- should not have attempted to make that coupling by hand, or to use his hand in making it, but that he should have used a stick or pin, and that if he had used a stick or pin to carry the link instead of his hand, that his hand or arm would not have been in a position where they could have been caught between the dead-woods of the cars coming together. That the steam might have come up in the manner testified to, and if he had observed the rules of the company in that regard he would not have been in a position to have been caught by these dead-woods.

As I have already said, it is the province and right of the railroad company to adopt rules an- regulations for the carrying on of the business of the company, and for the guidance of the employés of the company; and employés who have entered into the employ of the company, it is their duty to obey these rules and regulations that are in force.

In the first place the question of fact comes up whether or not there was or was not then at the time of this accident a rule of the defendant company in force in regard to this matter of the mode of making these couplings.

40 There has been introduced in evidence a paper called a personal record, which plaintiff himself admits contains his signature, that was signed by his own handwriting on the day it bears date, November 12th, 1889, and under the thirteenth interrogatory he says as follows, which I will read to you:

"Have you read, and do you understand, the following extract

from the Book of Rules of the Northern Pacific Railroad Company?" To which he answers "Yes." The extract is as follows:

"Caution as to personal safety—25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or person of those engaged in coupling, all persons are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yardmaster or conductor. Sufficient time is allowed and may be taken by employés in all cases to make the examination required.

Coupling by hand is strictly prohibited. Use for guiding your link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose as above specified. All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it."

It is claimed by the defendant that this was a rule which was in force, and that it required the employés not to make couplings by hand, or by the use of the hand alone, but that a stick or pin must be used, and that as plaintiff himself has testified that he did not use a stick or pin it is shown that he violated the rules by so doing and has contributed by his own negligence to the happening of this accident.

The question to be first determined is whether or not this rule was or was not in force at the time of the accident. The evidence shows that the defendant company printed a series of rules which have been introduced in evidence, among which is contained this rule 25, of which I have read an extract to you. The question for you to determine under the evidence is whether that rule was in fact in force.

Generally the duty and obligation of an employé is to observe the rules and obligations of the company that are in force. They
41 are made for the guidance of the employés, and the company has a right to direct how their business shall be carried on and they shall have a right to demand from the employés that they will observe those rules. If the employé does not do that, but violates the rules and regulations, and from the violation of them receives an injury, of course, he cannot recover from the defendant company if the rules are in force.

The question is whether under the evidence you are satisfied that this rule was in force. It is true that a rule may be adopted by a corporation; that it may be put in the form of printing; there may be printed rules, and yet in effect it may be true nevertheless that the rule is not in force. In the first place, the rule may never be really put in force, it may be adopted in the sense that it may be among the rules; it may be drafted as a rule by the company, but

yet it may never be put in force and use. Or it may be put in force and then the company may abandon it and give it up, and then ordinarily it would cease to be a rule of the company.

This, gentlemen, has got to be viewed as a practical question. Was that rule really in force? If it was, the employé was bound to obey it; if it was not in force, then, of course, it was not a rule. You have heard the testimony that has been introduced in the case upon that question as to whether or no this rule was or was not in force.

In the first place, on behalf of the defendant, they have introduced the rule themselves. There is the printed Book of Rules and among them is the rule which I have read to you. Also as showing the knowledge of the plaintiff defendant's counsel has introduced this written statement or paper, signed by the plaintiff himself, and in that he states that he has read and understands that very rule I have read to you, which, as I said, forms part of these printed rules in the book.

Now, that will justify you in finding that *it if* was a rule of the railroad company that was in force, it was binding upon the plaintiff, unless the plaintiff, by evidence in the case, has satisfied you that in fact that rule was never put in force, or if it had been put in force once, it had been abandoned, so that the railroad company no longer regarded it as a rule to be observed by the employés. You must determine that question of fact from the evidence that has been submitted to you and determine whether that rule was or was not in fact in force at the time of the accident. If you find the rule was in force and you further find that the plaintiff did not observe it, that he knew of this rule and did not observe it, and that in violation of that rule he went in there and attempted to make that coupling without the use of a stick or a pin, and if you are further satisfied that if he had used a stick or pin this accident would not have occurred, then this evidence would justify you in find-
42 ing that the charge of contributory negligence was made out against the plaintiff, and in that case your verdict would be for the defendant.

On the other hand, if you find that the rule was not in force, then that no longer cuts any figure in this case.

Another point that is made on behalf of the defendant under this rule is, that the rule requires the employés to examine the couplings before making them to see that they are in good condition before actually attempting to make a coupling. This rule 25 reads as follows upon that subject:

"Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus."

It is claimed on the part of the defendant that the plaintiff under this rule was required to make an examination of these two cars he

was about to couple together and that it was his duty under that rule to take sufficient time to examine them both to see what the general make-up of the car was and what, if any, defects, if any there might be in them, and to know that they were all right before attempting to make the coupling, and by ascertaining the character of the cars he would then know what position he must take in order to make the coupling.

There has been evidence tending to show that an employé must place himself in a different position or that his hands and arms must be placed in a different position when he comes to make a coupling with a car fitted with these double dead-woods than he he would be required to take when coupling a car fitted with single dead-woods. You will remember the testimony with reference to that matter, that in order to couple cars fitted with double dead-woods he must place one hand above and one hand below in order to couple the cars when they come together. It seems to me that this rule, perhaps, goes to no greater extent than what the law itself would require of the party. As I said before, the duty and obligation is upon the employé to exercise due care for his protection.

When in the exercise of his duty there are cars to be coupled together, when, if the fact is as testified to by some of the witnesses that the character and make-up of the cars are material matters to be known so that the employé may know how to dispose himself in order to place his hands and arms safely, the question is
43 whether the law in requiring the employé to exercise ordinary care, does not require him to exercise care to look at the cars and notice the make-up and character of the same, so that he may know the position he is placed in when it is required of him to go between these cars for the purpose of making a coupling.

This rule says he is enjoined before coupling the cars or engines to examine so as to know the kind and condition of the coupling apparatus and the general make-up and character of the cars, and that time sufficient to make that examination may be taken to see the condition of the car and to know what is required of them for their own protection. As I have already stated, the law itself exacts the exercise of ordinary care in this respect and it seems to me that this rule does not go beyond, or at any rate, but slightly goes beyond the obligation which the law itself imposes upon the employé.

It certainly must be true that a person going between these cars to make a coupling, knowing that the position in which he should place his hands must depend upon the make-up of the cars, certainly should, when he goes between them, exercise due care, watchfulness in some manner in order to know whether he can with safety to himself place his arm or hand or any portion of his body in a given position.

It is for you to determine, therefore, what was required of the plaintiff in the exercise of reasonable and ordinary care in carrying out the duty and obligation that was imposed upon him for his own protection when he went in to make that coupling. When he went in there did he or did he not exercise proper care and watchfulness

for his protection to ascertain the condition and make-up of the cars and their general character in order to determine whether he was justified in doing, and to determine the position in which he could place his hands and arms and other portions of his person at the time of making the coupling."

Thereupon, before jury retired, defendant duly excepted to that portion of the charge wherein the court refers to the packing of the piston-rod being out of repair and being an element of negligence on the part of the defendant.

Defendant also excepted to that portion of the charge wherein the court submits to the jury the question of whether rule 25 was in force at the time of the accident, and also excepted to that portion of the charge wherein the court refers to the question of the notice that should be given by *to* the employé to the master or his representative.

All of the foregoing exceptions and each of them were duly allowed by said court before the jury retired.

44 The defendant also requested the court to charge the jury as follows:

1st. The court instructs the jury to bring in a verdict for the defendant, which said request was refused by the court; to which refusal to charge — requested defendant's counsel then and there before the jury retired duly excepted, which exception the court then and there allowed.

2d. The court instructs the jury that if they believe from the evidence that the escape of steam from the hole where the piston-rod works, if the steam escaped therefrom, was the proximate and immediate cause of the accident, they must bring in a verdict for the defendant, which said request was refused by the court; to which refusal to charge as requested, defendant's counsel then and there before the jury retired duly excepted and the court then and there allowed said exception.

The defendant excepts specifically to the following portions of the charge:

"The first question for you to determine — whether the evidence satisfies you that there was a failure on the part of the railroad company to exercise this ordinary care to furnish an engine that was properly equipped for that business. So in the first place, the question is whether that engine was in proper condition to be used, or whether it was in improper condition to be used; was it or was it not lacking in that particular? There has been evidence introduces tending to show that the cocks of the cylinders of this engine were in such condition that steam escaped therefrom, and that it was not in the power or within the control of the engineer to prevent the escape of steam from these cylinder cocks when the engine was being used.

You have heard the evidence that has been introduced upon that point, and it is for you to say whether the plaintiff has satisfied you by a fair and reasonable preponderance of the evidence that the engine was faulty in that particular.

It is also charged by the plaintiff that the engine besides being

faulty in this particular of the cylinder cocks, was in such condition that steam escaped from round the piston-rod where the piston-rod entered the cylinder. You are to determine whether or no the defendant had used the ordinary care in having the engine in good and proper condition, and in a safe condition for the use of its employés when they were engaged in the business of switching in that yard of Glendive.

If you find in the evidence, as I have already stated, that this defect was not the proximate cause of the accident, then that is an end of the case, and your verdict must be for the defendant. On the other hand, if you find under the evidence that the coming up of the steam between the cars, if you find it did come up, was the proximate cause of the accident, then you will be required to consider and determine the question that arises under the charge of negligence which is made by the defendant railway company against the plaintiff in this action."

Defendant also specifically excepted to the following portion of said charge:

"It is claimed by the defendant that this was a rule which was in force, and that it required the employés not to make couplings by hand, or by the use of the hand alone, but that a stick or a pin must be used, and that as the plaintiff himself has testified that he did not use a stick or pin it is shown that he violated the rules by so doing and has contributed by his own negligence to the happening of the accident.

The question to be first determined is whether or not this rule was or was not in force at the time of the accident. The evidence shows that the defendant company printed a series of rules which have been introduced in evidence, among which is contained this rule, 25, of which I have just read an abstract to you. The question for you to determine under the evidence is whether that rule was in fact in force.

Generally the duty and obligation of an employé is to observe the rules and obligations of the company that are in force. They are made for the guidance of the employés, and the company has a right to direct how their business shall be carried on, and they shall have a right to demand from the employés that they will observe those rules. If the employé does not do that, but violates the rules and obligations and from the violation of them receives an injury, of course he cannot recover from the defendant company if the rules are in force.

The question is whether under the evidence you are satisfied that the rule was in force. It is true that a rule may be adopted by a corporation; that it may be put in the form of printing; there may be printed rules, and yet in effect it may be true, nevertheless, that the rule is not in force. In the first place the rule may never be really put in force; it may be adopted in the sense that it may be among the rules; it may be drafted as a rule by the company, but yet it may never be put in force and use; or it may be put in force and the company may abandon it and give it up and then ordinarily it would cease to be a rule of the company.

This, gentlemen, has got to be viewed as a practical question; was that rule really in force? If it was the employé was bound to obey it; if it was not in force then, of course, it was not a rule.

46 You have heard the testimony that has been introduced in the case upon that question as to whether or no this rule was or was not in force. In the first place, on the behalf of the defendant, they have introduced the rules themselves. There is the printed Book of Rules, and among them is the rule which I have read to you. Also as showing the knowledge of the plaintiff, defendant's counsel has introduced his written statement or paper, signed by the plaintiff himself, and in that he states that he has read and understands that very rule I have read you which, as I have said, forms part of these printed rules in the book.

Now that will justify you in finding that if it was a rule of the railroad company that was in force, it was binding upon the plaintiff, and unless the plaintiff by evidence in the case has satisfied you that in fact the rule was never put in force, or if it had been put in force once, it had been abandoned so that the railroad company no longer regarded it as a rule to be observed by the employés.

You just determine that question of fact from the evidence that has been submitted to you and determine whether that rule was or was not in fact in force at the time of the accident. If you find the rule was in force, and you further find that the plaintiff did not observe it, that he knew of this rule, and did not observe it, and that in violation of that rule he went in there and attempted to make the coupling without the use of a stick or pin, and if you are further satisfied that if he had used a stick or pin this accident would not have occurred, then this evidence would justify you in finding that the charge of contributory negligence was made out against the plaintiff, and in that case your verdict would be for the defendant.

On the other hand, if you find that the rule was not in force, then that no longer cuts any figure in the case."

The following is the entire charge:

The court charged the jury in full as follows:

In the case now on trial before you the plaintiff seeks to recover damages against the defendant railroad company for an injury which he evers he sustained when in the employ of the railroad company as a switchman at the station of Glendive on the road of the defendant corporation.

Therefore, it appears that this is a case growing out of the operation of a railroad company. The plaintiff had entered into the employ of the railroad company and taken upon himself to perform the duties which were expected of him in his position as a switchman. Now it is a general principle that a person who enters into any occupation, and becomes the employ- of another, whether of a

47 corporation or an individual, he himself, the employé or servant, assumes the risks and hazards pertaining ordinarily to the business itself; that is, all the risks and hazards and dangers which may be pertaining to the business when it is prop-

erly carried on. As you well know, there is a difference in the degree of risks and hazards pertaining to different occupations. Some classes of business are much more dangerous even when properly carried on than others.

This business of railroading, as your knowledge and experience teaches you, is a risky business, even when it is carried on with the best of care which can be given to it, by reason of the great forces that are employed, the great power of the same, the rate of speed at which the cars travel, and various other circumstances which you well know, and which I need not detail, all of which render the business a risky and hazardous one; and when parties enter into a business or occupation of that kind they themselves assume the risk- that *that* belong to that particular business when it is properly carried on. They do not, however, assume the risks and hazards that are caused by the negligence of the master or employer in the carrying on of that business.

The law imposes a duty upon a railroad company to exercise ordinary care; that is, the degree of care that a corporation or company managed by skillful and prudent men should exercise in furnishing for its employés safe machinery and appliances with which to do the work to be done by them, that to exercise the same degree of care in seeing to it that the machinery furnished is kept in proper order and condition. This is the degree which the law imposes upon a railroad company, and it is an obligation which cannot be evaded by the corporation.

Likewise the law imposes the duty and obligation upon employés or servants to exercise a corresponding degree of care on their part. A servant or employé knows when he goes into this business that it is a risky and hazardous one, that he will be called upon in the ordinary performance of his duty to place himself in positions of danger.

The law, therefore, places upon him a corresponding duty or obligation to exercise ordinary care, such care as a man should exercise under the same circumstances for his own protection. The duty, therefore, to exercise this degree of care which I have defined to you, is placed upon both parties in a corresponding degree.

Now, if in the carrying on of this business an accident happens and the person or employé is injured, it is not simply by reason of that fact that the employé is entitled to recover damages against the railroad company. He must go farther, and show that the railroad company had been negligent in some particular, and that
48 the negligence was the proximate or immediate cause of the injury or of the accident causing the injury to the employé. If the accident happened without fault and without negligence on the part of the railroad company, then the employé, no matter how seriously injured, cannot recover damages against the railroad company.

Furthermore, it is the principle of law that if the party, plaintiff himself, the employé or servant, by negligence on his own part causes the accident, or aids in causing the accident, then he cannot recover damages against the railroad company for such injury.

If it — his own negligence that causes the accident, without fault on the part of the railroad company, of course he cannot recover, for, of course, then no blame and no negligence can be attributed to the railroad company, and that is an end of the case.

Furthermore, if the employé or servant himself, by his own negligence aids in causing the accident, or contributes to causing the accident, then likewise he cannot recover, although the railroad company might have been negligent on its own part. This is upon the principle of law that the law will not attempt to separate the consequences where both parties have been guilty of negligence; the law does not attempt to do that, but leaves both parties as they are. Where they are both at fault, and leaves both parties without remedy, one against the other. Therefore, if the employé, by negligence on his own part, causes the accident, or aids in causing an accident to himself, he cannot recover damages therefor against the railroad company.

Generally, also, a railroad company has a right to adopt all reasonable and proper rules to the carrying on of its business, and for the guidance and control of its employés who are engaged in carrying on the business of the railroad company, and ordinarily the duty and obligation is upon the employé to observe those rules which are in force in the business of the railroad company in whose employ he may be.

In this particular case it is not in dispute between the parties that the plaintiff was in the employ of the defendant railroad company as switchman at this station of Glendive, in the State of Montana, in the month of December, 1889, and it is not in dispute that on the evening of December the 16th, of that year, while engaged in switching cars in the yard of the defendant company, the plaintiff met with an accident to his hand which resulted in the amputation of his right hand.

The questions which are in dispute between the parties here — as to these questions of negligence; the plaintiff claiming that the defendant railroad company is chargeable with negligence, and
49 the defendant denying the same, and claiming also that the plaintiff himself, by his own negligence, contributed to the accident, or aided in causing the accident to happen to him.

On the part of the plaintiff it is claimed that the negligence causing the accident to happen to him, was in having in use in the yards at Glendive, on the occasion named, an engine that was faulty in this particular; that steam was allowed to escape and would escape from the cylinder of the engine in such quantities that it came up between the cars when plaintiff was called upon to go between the same in order to make a coupling, and that such steam so blinded him as to render him unable to see the condition of affairs so as to act for his own protection, and that in the effort of getting out from between the cars under the circumstances, he received the injuries which caused him the loss of his arm.

As I have already stated in general terms, the duty existed and was placed on the railroad company to furnish for use in that yard at Glendive, Montana, a proper switch-engine for the business to be

transacted by said switch in said yard; or rather that the railroad company should use ordinary care, as I have already defined it to you, in seeing to it that an engine, properly equipped for use, was furnished to the employés in that yard for the purpose of doing the switching there.

The first question for you to decide is whether the evidence satisfies you that there was a failure on the part of the railroad company to exercise this ordinary care to furnish an engine that was properly equipped for that business. So in the first place the question is whether that engine was in a proper condition to be used, or whether it was in an improper condition to be used. Was it or was it not lacking in any particular.

There has been evidence introduced tending to show that the cocks of the cylinders of this engine were in such condition that steam escaped therefrom; and that it was not in the power or within the control of the engineer to prevent the escape of steam from these cylinder cocks when the engine was being used. You have heard the evidence that has been introduced on that point, and it is for you to say whether the plaintiff has satisfied you by fair and reasonable preponderance of the evidence that the engine was faulty in that particular.

And it is also charged by the plaintiff that the engine, besides being faulty in this matter of the cylinder cocks, was in such condition that steam escaped from round the piston-rod, where the piston-rod enters the cylinder. You are to determine whether or no the defendant has used ordinary care in having the engine in good and proper condition, and in a safe condition for the use of its employés when they are engaged in the business of switching in that yard at Glendive.

If you do not find that this charge of negligence has been sustained by the evidence, then that is the end of the case, and your verdict will be for the defendant.

If the evidence satisfies you that this engine was defective in the particular named, and that the railroad company has not exercised ordinary care, the degree of care that the law expected of it in keeping the engine in proper order, then the next question will be, was this the approximate and immediate cause of the accident to the plaintiff? That requires that you should examine the situation and circumstances surrounding the plaintiff at the time of the accident and inquire as to what caused the accident to the plaintiff.

Plaintiff has introduced evidence tending to show that on the evening in question, somewhere about 8 o'clock or a little after, December 16th, 1889, he was there as one of the crew engaged in switching in the yards at Glendive, and that in doing the business which was required of them a train was made up, as the witness has testified before you, and that he was called upon in the discharge of his duty to go between two cars; that there were some cars already upon the track that had been cut off and placed upon that particular track, that was standing still, that then there was another car or cars that were to be brought down by the locomotive and it was expected of him that he should go in and make the

coupling between the moving and the standing cars, and that then all the cars should be pushed down the track by the use of the locomotive.

In performing that duty the plaintiff has introduced evidence tending to show that he passed in between these cars and that as the locomotive with the car or cars attached to it was brought down towards the standing car there is evidence tending to show that upon the car or cars that were thus being brought down there was on the end of the car what is known as a double dead-wood.

Evidence has also been produced tending to show that upon the standing car there was also these double deadwoods, and to show the effect that is produced when these double dead-woods come together, and the question arises as to the duty of persons who are engaged in coupling cars thus equipped, or seeing that their hands and bodies are so kept that they will not get between these dead-woods when they come together. Because it is a matter of course that if a person's arm or hand or body is between these dead-woods when they come together they must be crushed.

51 The plaintiff claims in his testimony that he went in between the two cars in front of the moving car and went down with it to where the other standing car was that, it appears, had on these double dead-woods. He testifies that he had his lantern in the other hand with the link of the moving car in his right hand; and he testifies that when the cars had come within a few feet or a short distance of each other that the steam came up between the cars in such a volume as affected his sight, and blinded him, and he was unable to see the condition of standing car, and that he made an effort to get out; that the steam so affected his vision that he was unable to see the other car, and instead of making the coupling he had gone in to make, as soon as the steam came in there he at once attempted to get out, but the steam so affected his sight and rendered it impossible to him fairly to perceive the risk that might come upon him, and he then endeavored to get out from between the cars, but in doing that his arm or hand was caught, and he received the injury complained of.

In determining whether or no it can be said that this defect, if you find it was a defect, was the proximate or immediate cause of the injury, you have to determine whether the coming up of the steam between the cars, if you find from the evidence that it did come up according to the claim of the defendant, whether or no that had such an effect in obscuring his sight or vision when he was attempting to discharge his duty in coupling these cars as that it resulted in causing this accident and injury to him.

Was the coming up of this steam between the cars the reason that the plaintiff was caught between them and injured? If it was not, then of course that is an end of the case, because that is the charge of negligence against the defendant company; and that is, that the cylinder cocks were in bad order, in that they allowed the steam to escape, and by thus escaping come up between the cars, and that the steam so coming up blinded and effected the vision of the plaintiff, so that he gave up the attempt to make the coupling,

and endeavored to get out from between the cars, and in so doing was caught and injured. If that was not the cause of the accident, then the plaintiff has failed to show that this fact, if you believe it existed, was the approximate cause of the injury.

The burden of proof is upon the plaintiff to show not only the fact of negligence on the part of the railroad company, but he must also show that this defect in the locomotive was the approximate cause of the accident.

If you find under the evidence, as I have already stated, that this defect was not the proximate cause of the injury, then that is the end of the case, and your verdict must be for the defendant.

52 On the other hand, if you find under the evidence that the coming up of the steam between the cars, if you find it did come up, was the proximate cause of the accident, then you will be required to consider and determine the question that arises under the charge of negligence which is made by the defendant railroad company against the plaintiff in this action.

In the first place, it is claimed on the part of the defendant that under the rules of the company the plaintiff should not have attempted to make that coupling by hand, or used his hand in making it, but that he should have used a stick or pin, and that if he had used a stick or pin to carry the link instead of his hand, that his hand or arm would not have been in a position where they could have been caught between the dead-wood of the cars coming together, that the steam might have come up in the manner testified to, and if he has observed the rules of the company in that regard he would not have been in a position to have been caught by these dead-woods. As I have already said, it is the province and right of a railroad company to adopt rules and regulations for the carrying on of the business of the company, and for the guidance of the employés of the company, and the employés who have entered into the employ of the company, it is their duty to obey these rules and regulations that are in force.

In the first place, the question of fact comes up whether or not there was or was not then at the time of this accident a rule of the defendant company in force in regard to this matter of the mode they should make couplings.

There has been introduced in evidence a paper called a personal record which plaintiff himself — contains his signature that is signed by him in his own handwriting on the day it bears date, November 12th, 1889; under the 13th interrogatory he says as follows, which I will read to you: "Have you read, and do you understand the following extract from the Book of Rules of the Northern Pacific Railroad Company, to which he answers 'Yes.'"

The extract is as follows: "Caution as to personal safety—25. Great care must be exercised by all persons when coupling cars inasmuch as the coupling apparatus of cars and engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, the arms, or person of those engaged in coupling. All persons are enjoined before coupling cars or engines to examine so

as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling, until they have
53 first reported its defective condition to the yardmaster or conductor. Sufficient time is allowed and may be taken by employés in all cases to make the examination required. Coupling by hand is strictly prohibited. Use for guiding the link a stick or a pin. Each person having to make couplings is required to provide a proper implement for the purpose, as above specified. All persons entering into or remaining in the services of the company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it."

It is claimed by the defendant that this was a rule which was in force, and that it required the employés not to make a coupling by hand, or by the use of the hand alone, but that a stick or pin must be used, and that as the plaintiff himself has testified he did not use a stick or pin it is shown that he violated the rule by so doing, and has contributed by his own negligence to the happening of this accident.

The question to be first determined is whether or not this rule was or was not in force at the time of the accident. The evidence shows that the defendant company printed a series of rules which have been introduced among which is contained this rule 25 of which I have just read an abstract to you. The question for you to determine under the evidence is whether that rule was in fact in force. Generally, the duty and obligation of the employé is to observe the rules and obligations of the company that are in force. They are made for the guidance of the employés, and the company had a right to direct how their business shall be carried on, and they shall have a right to demand from their employés that they shall observe the rules. If the employé does not do that, but violates the rules and regulations, and from the violation of them received an injury, of course he cannot recover from the defendant company, if the rules are in force.

The question is whether under the evidence you are satisfied that this rule was in force. It is true that a rule may be adopted by a corporation; it may be put in the form of printing, there may be printed rules, and yet in effect it may be true, nevertheless, that the rule is not in force. In the first place, the rule may never really be put in force. It may be adopted in the sense that it may be among the rules, it may be drafted as a rule by the company, but yet it may never be put in force and use. Or it may be put in force, and then the company may abandon it and give it up, and then ordinarily it would cease to be a rule of the company.

This, gentlemen, has got to be viewed as a practical question; was that rule really in force? If it was, the employé was
54 bound to obey it; if it was not in force, then, of course, it was not a rule. You have heard the testimony that has been introduced in the case upon that question as to whether or not this rule was or was not in force. In the first place, on behalf of the defendant, they have introduced the rules themselves. There is the

printed Book of Rules and among them is the rule which I have read to you. Also as showing the knowledge of the plaintiff, defendant's counsel has introduced this written statement or paper signed by the plaintiff himself, and in that he states that he has read and understands that very rule I have read to you which, as I have said, forms part of these printed rules in the book.

Now, that would justify you in finding that if it was a rule of the railroad company that was in force it was binding upon the plaintiff, unless the plaintiff, by evidence in the case, has satisfied you that in fact that rule was never put in force, or if it had been put in force once, it had been abandoned so that the railroad company no longer regarded it as a rule to be observed by the employés. You must determine that question of fact from the evidence that has been submitted to you and determine whether that rule was not in fact in force at the time of the accident.

If you find the rules was in force, and you further find that the plaintiff did not observe it, and that he know of this rule and did not observe it, and that in violation of that rule he went in there and attempted to make that coupling without the use of a stick or pin, and if you are further satisfied that if he had used a stick or pin this accident would not have happened, this action would not have occurred, then this evidence would justify you in finding that the charge of contributory negligence was made out against the plaintiff, and in that case your verdict would be for the defendant.

On the other hand, if you find that the rule was not in force, then that no longer cuts any figure in this case.

Another point that is made on behalf of the defendant under this rule is, that this rule required the employés to examine the couplings before making them to see that they are in good condition before actually attempting to make a coupling. This rule 25 reads as follows upon that subject:

"Inasmuch as the coupling apparatus on cars or engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or person of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus."

55 It is claimed on the part of the defense that the plaintiff under this rule was required to make an examination of these two cars he was about to couple together, and that it was his duty under the rule to take sufficient time to examine them both to see what the general make-up of the car was and what, if any, defects there might be in them, and to know that they were all right before attempting to make the coupling, and by ascertaining the character of the car he would then know the position he must take in order to make the coupling.

There has been evidence tending to show that the employé must place himself in a different position, or that his hands and arms must be placed in different positions when he comes to make a coupling with a car fitted with these double dead-woods than he

would be required to take when coupling a car fitted with a single dead-wood.

You will remember the testimony with reference to that matter, that in order to couple cars fitted with double dead-woods he must place one hand above and the other below in order to couple the cars when they come together. It seems to me that this rule perhaps goes to no greater extent than what the law itself would require of the party. As I have already said, the duty and obligation is upon the employé to exercise due care for his own protection. When in the exercise of his duty there are cars to be coupled together, when, if the fact is as testified to by some of the witnesses, that the character and make-up of the cars are material matters to be known so that the employé may know how to dispose himself in order to place his hands and arms safely, the question is whether the law, in requiring the employé to exercise ordinary care, does not require him to exercise care to look at the cars and notice the character and make-up of the same, so that he may know the position he is to be placed in when it is required of him to go between these cars for the purpose of making the coupling.

This rule says he is enjoined before coupling cars or engines to examine so as to know the kind and condition of the coupling apparatus and the general make-up and character of the cars, and that time sufficient to make that examination may be taken to see the condition of the cars and to know what is required of them for their own protection.

As I have already stated, — expects the exercise of ordinary care in this respect, and it seems to me as though this rule does not go beyond, or at any rate but slightly goes beyond, the obligation which the law itself imposes upon the employé.

It certainly must be true that a person going between these cars to make a coupling, knowing the position in which he must
56 place his hands must depend upon the make-up of the cars, certainly should when he goes between them exercise due care and watchfulness in some manner in order to know where he can with safety to himself place his arms or hands or any portion of his body in a given position.

It is for you to determine, therefore, what was required of the plaintiff in the exercise of reasonable and ordinary care in carrying out the duty and obligation that was imposed upon him for his own protection when he went in to make the coupling.

When he went in there, did he or did he not exercise proper care and watchfulness for his own protection to ascertain the condition of the cars and their general character in order to determine whether he was justified in doing, and to determine the position in which he could place his hands and arms and other portions of his person at the time of making the coupling.

I do not know that I can give you any further light upon the law of this particular branch of the case. As I stated before, the duty is upon the plaintiff *is* to exercise due care for his own protection. If he fails in doing so and by reason of that fact he gets caught; that is, if by his own negligence he brings about or aids

to bring about the accident and injury to himself, then under the general principle of law which I have already given you, he would be guilty of contributory negligence and cannot in that case recover from the defendant.

There is one other matter which has escaped my attention, and I must return again to the claim made by the plaintiff, that is as to the knowledge which the plaintiff had of the condition of the engine in question.

It is the general principle of law that where a party may know of the defect, if there is a defect, existing in the machinery he is required to work with, if he knows of the existence of that defect, and then knowing its existence he goes ahead and works with it, that defeats his right of recovery, because he knows that the instrument or appliance or whatever it is that he is called upon to work with is in a dangerous condition. The law places upon him the duty of notifying the master of that fact to give him the opportunity to take proper steps in having it remedied.

It may be duty of the employé under the circumstances to refuse to do any work with the appliance or machinery if it is in a dangerous position. The plaintiff has testified that he knew of the defective condition of the locomotive, and that this steam did escape from it; that he was aware of that fact. If he then, knowing that fact and knowing the danger that might arise from the fact went on and used that engine and made no complaint about it, then, as I
57 said before, that would defeat his right of recovery in this case, because it would be his duty to either refuse to work with it or demand of the master that proper repairs be made.

In carrying out the duty which is imposed upon the employé it cannot be permitted that he, knowing that the appliances he is working with are in bad condition, shall go to work with them without calling the attention of his superiors to the fact, and then if any injury occurs turn round and recover therefor, because it is ordinarily the employé who first knows that the machinery is in bad condition and it is generally through the employé that the master learns of the fact, and that the information comes from him of the defective condition of the machinery or appliance.

The law says where an employé has knowledge of this defective machinery he shall give notice to the master, and if the employé goes to work and uses the machinery in that defective condition he takes the risk upon himself and assumes the hazards, and in case of accident the master would not be liable.

If the employé find out there is a defect in the machinery or appliances and calls the attention of the proper person to it, the master, or proper representative of the master, and the employé receives assurances that the defect will be remedied, then it does not necessarily follow that he should be held guilty of contributory negligence if he continues to use the machinery.

It will depend upon the character and the amount of the risks he would be subject to. And that would be a question — fact for a jury to determine whether under the facts of the especial case the employé was guilty of contributory negligence in continuing to use

the machinery; under the circumstances he had discovered the defect, the nature of the defect, and if he had given notice to the master or the proper representative of the master, and had received assurances that this defect would be attended or remedied.

In the railway employment where prompt service is demanded from the employés to make up trains and get cars ready for prompt shipment and the prompt action that is required in the management of railroad business, I think common experience will teach you that the employé may not be placed in exactly the same position as they would in any other kind of business, that is, they cannot so readily refuse to do a particular work with a particular instrument because they happen for the moment to find that it is in bad condition.

Here is a locomotive and a train passing over the country, and the engineer suddenly discovers that there is some defect in
58 the locomotive or a defect to be found in the car; the employé cannot abandon the train in the middle of the road and leave it there. They are justified in going ahead until they reach a reasonable place where the defect can be remedied, and if after they have made that discovery, and while getting the train in a proper place, an accident should happen and somebody should be injured, it would not be fair to hold that they then assumed that risk.

In this particular case it is for you to determine under the circumstances whether the plaintiff exercised ordinary care and whether he should have refused to make or attempt to make that coupling, knowing the engine was in the condition testified to. Was he justified in attempting to make the coupling in view of the facts? If you are satisfied from the evidence that he had made complaint about this engine to his superior and had received assurances that the defects complained of should be remedied either by repairing the engine or by substituting another engine in its place.

What I am attempting to express to you is this: Supposing that there are these defects, but that nevertheless by taking due care the engine could be used without injury, the existence of the defects is found out by the employé and he makes complaint to his proper superior and that proper superior says, "We will get another engine or have the defect remedied," then should the employé be guilty of negligence if he continued to use that engine knowing the machinery was in bad condition, if that engine was in such a bad condition that it would necessarily bring about risks and hazards at once, then the employé ought to stop right off. He is not justified in going ahead and doing a thing where it is almost certain to bring injury upon him.

But if the risk is not certain, if the defect is not of a character but that he might still use the engine for the time being while they were waiting for it to be repaired or for another engine to take its place, it seems to me that a man might take much risk and not be liable to the charge of contributory negligence.

To repeat then, this is a case which stands upon this question of

negligence. The charge of the plaintiff is that the accident resulted from the bad condition of the cylinder of the engine, whereby some steam escaped therefrom, and that that was the approximate cause of the accident.

If the plaintiff has satisfied you by fair and reasonable preponderance of the evidence that the cylinder was in bad condition, that it was negligence on the part of the railroad company to allow it to be and to continue in that condition; and that in the condition in which it was it caused a greater risk or hazard to the employés of the company than would have been caused to
59 them if the engine had been in good repair. If you are satisfied by the evidence that the escape of steam was the approximate cause of the accident, and that if it had not been for the escape of steam the accident would not have happened, *and* that would justify you in finding that the charge of negligence against this railroad company is made out; but on the other hand, if the evidence failed to satisfy that particular that the charge of negligence on the part of the defendant is made out, then your verdict will be made for the defendant.

If you find for the plaintiff upon that issue, then the next question you will consider under the evidence will be the charge made by the defendant against the plaintiff, was the plaintiff himself guilty of contributory negligence? If the evidence satisfies you that the plaintiff was guilty of contributory negligence, either in failing to obey the rule that was in force with regard to the manner of making this coupling with the use of a stick or pin, as I have already explained that matter to you, if he did not use or exercise proper care in examining the car to ascertain the make-up of this car before he attempted to make the coupling, and the result of that was to cause or aid in causing the injury, then you would be justified in finding that the charge of contributory negligence was made out, and in that case your verdict would be for the defendant.

If, upon this issue, you should find for the plaintiff then you will be required to consider the question of the amount of damages to be awarded.

In this particular case there is no dispute as to what the effect of the injuries received has been. That has been detailed before you, and it is not questioned, but that the result of it was that the plaintiff suffered amputation, causing him the loss of his right hand.

The rule of damages is compensation, that is the general rule. The plaintiff is entitled to be compensated fairly for the pain and suffering that has been caused to him by the accident. He is also entitled to be compensated for any loss of time that may have been occasioned to him by the accident, and for the effect it may have upon his ability to earn money. In deciding this last question you are to take into account the age of the plaintiff, his capacity for earning money before the accident, and what his capacity would be if this accident had not happened to him; what the effect of this accident has been as effecting his ability to earn money in the past and in the future.

It is impossible for the plaintiff to bring in evidence before you

showing you exactly what the amount of his damages would be; that cannot be done as it can be in a case of loss or destruction of property or things of that sort.

60 All that can be expected is that they should bring evidence to show the circumstances surrounding the plaintiff, and then the matter must be left to the fair, impartial, dispassionate judgment of the jury. If you are to take into account the general position and capacity or ability of the plaintiff for earning money what it was without the accident, and in what way it was affected by the result of the accident, you will also take into consideration the contingencies of human life and human affairs.

As you know, human life is uncertain, some men die young, some live to be old men, he may be successful in acquiring property, or he may not have the ability to earn money; these are matters for your consideration.

It is impossible for the court to give any assistance to the jury in this matter, except to lay certain principles of law before you; nevertheless, you must take all the circumstances into consideration in determining the amount of your reward in your verdict if you find for the plaintiff. All that the court will say to you is that the plaintiff is simply entitled to such an amount as from your fair, dispassionate judgment will fairly compensate him for the pain and suffering he has endured; and as the accident affects or has affected his ability to earn money in the past and in the future.

The jury then retired and rendered a verdict in favor of the plaintiff and against the defendant for the sum of five thousand dollars.

And because the foregoing matters and things do not appear of record in said action, the judge who tried said cause finding the same to be true and correct, has signed and sealed this bill of exceptions this 11th day of September, 1891, and ordered the same to be made a part of the record of said action.

O. P. SHIRAS, *Judge.*

MINNEAPOLIS, MINN., *Sept.* 5, 1891.

It is hereby stipulated by and between the attorneys to this action that the foregoing may be signed, settled and allowed by the court as a "bill of exceptions" to be used upon appeal of this case.

F. D. LARRABEE,
*Att'y for Plaintiff.*
TILDEN R. SELMES,
*Att'y for Defendant.*

61 Northern Pacific railroad.

N. P. R. R. Co.
Received,
Nov. 18, 1889.
Claim dep't.

*Personal Record.*

The superintendent will require all persons, before entering the service of this company, to answer the following interrogatories in

their own handwriting. Blanks must be filled up and signed in triplicate; two copies being forwarded to the superintendent with any letters of recommendation which applicant may have, of which a record will be made and letters returned. The applicant will keep the third copy for future reference. Superintendents will forward to general claim agent, St. Paul, one of the copies sent them.

T. F. OAKES,
*President and General Manager.*

To F. H. Marsh, division sup't, Yellowstone division.

1. Age? 23. Married or single? Single.
2. Birthplace? Fond du Lac. State? Wisconsin.
3. Name of parents, if living? Mr. and Mrs. T. C. Nickels. Residence? 719 Third avenue, N. Minneapolis, State of Minn.
4. Name and degree of nearest relative, if parents are dead? ——.
5. How many years' experience in railroad service? Ten.
6. ——.
7. In what business before entering the railroad business? None. ——.
8. Name all roads on which you have been employed.

| Railroad. | At what station or division. | In what capacity. | In what year. |
|---|---|---|---|
| M. & St. L. | Minneapolis. | Breaking. | 1889. |
| S. P., M. & M. | Minneapolis. | Firing. | 1888. |
| St. P. & D. | St. Paul. | Tin shop. | 1888. |

9. If you have been employed before on any division of this road, or branches, state which one, when, and in what capacity. None.
10. On what road last employed? M. & St. L. Cause of leaving? None.

62 11. ——.

12. How have you been occupied since your last employment terminated? Looking for a job.
13. Have you read and do you understand the following extract from the Book of Rules of the Northern Pacific Railroad Company? Yes.

*Caution as to Personal Safety.*

25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling, until they have first reported its defective condition to the yardmaster or conductor. Sufficient time is allowed, and may be taken by employés in all cases, to make the examination required. Coupling by hand is

strictly prohibited. Use for guiding the link a stick or pin. Each person having to make couplings is required to provide the proper implement for the purpose, as above specified.

All persons entering or remaining in the service of the company are warned that the business is hazardous. Each employé is expected and required to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. Stepping upon the front and rear of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between cars in motion to uncouple them and all similar imprudencies are dangerous and in violation of duty, and are strictly prohibited.

Employés of every rank and grade are required to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required, and, if not, to put them in proper condition, or see that they are so put before using them. All will be held responsible accordingly.

DEFENDANT'S EXHIBIT No. 1.

14. Do you agree to comply with all the requirements of the foregoing rule in case you enter into the company's employ? Yes.

63 15. You are notified that if you, or any other employé, chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific Railroad Company, you do so solely at your own risk. The company expects you and all other employés to comply strictly with all its rules and regulations, and does not, and will not in any case, acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employé of the company, whether habitual or otherwise, are consented to or acquiesced in by the company? Yes.

16. Do you know that by a rule of said railroad company its employés in all departments are required to give the company ten (10) days' notice of their intention to quit the service, such notice to be given to the superintendent or general foreman of their department, and do you assent to such rule in entering the employment of said company? Yes.

This application made by, Harry Nickels.
(Sign your name in full; no initials.)
Located at, Forsyth.
Dated, Nov. 12, 1889.
Witness: Chas. A. Stillman.

Northern Pacific Railroad Company.

Personal record.

Name, Harry Nickels.
Occupation, brakeman.
Date of application, Nov. 12, 1889.

Date employed, June 26, 1889.
Division, Yellowstone.
Above to be filled by division superintendent.

*Description of Person Named Within.*

1. Height, 5 feet 4 inches.
2. Form, heavy.
3. Weight, 160 pounds.
4. Complexion, dark.
5. Color of hair, brown.
6. Color of eyes, blue.
64 7. If beard is worn, what color and in what manner; none.

Above to be filled by applicant.
Certified to as correct.

T. H. MARSH, *Employer.*

Indorsed: Ent. No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Company, defendant. Bill of exceptions. Filed October 3rd, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

H. W. NICKELS, Plaintiff,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

*Assignments of Error.*

And now comes the above-named defendant by Jno. C. Bullitt, Jr., and Tilden R. Selmes, its attorneys, and says that in the record and proceeding in the said court in the above-entitled action, and also in giving judgment in said action, there is manifest error in this:

I. The court erred in overruling the objections made by counsel for defendant to the questions put to the plaintiff when testifying in his own behalf as follows:

What was the custom or habit of employés of the Northern Pacific road at the time you were injured and prior thereto while you were in the employ of the company, in regard to using a stick or pin in the making of a coupling?

Objected to as immaterial, incompetent and irrelavant.

Objection overruled.

Defendant excepts.

II. It was also error to overrule the objection made by the counsel for defendant to the question asked G. W. Weissert when testifying as follows:

What was the custom or habit of the brakemen and switchmen and employés that were called upon and whose duty it was to make couplings of cars, with regard to the use of the stick to direct the link into the drawbar?

Objected to as immaterial, incompetent and irrelavant.
Objection overruled.
Defendant excepted.

65 III. It was also error for the court to deny defendant's motion to strike out all the testimony of said witness, Weissert, with regard to the custom or habit of the employés of the Northern Pacific Railroad Company with regard to couplings, to the denial of which motion defendant duly excepted.

IV. The court also erred in charging the jury as follows:

The first question for you to determine is whether the evidence satisfies you that there was a failure on the part of the railroad company to exercise this ordinary care to furnish an engine that was properly equipped for that business. So in the first place the question is, whether that engine was in proper condition to be used or whether it was in improper condition to be used; was it or was it not lacking in that particular? There has been evidence introduced tending to show that the cocks of the cylinder of this engine were in such condition that steam escaped therefrom; and that it was not in the power or within the control of the engineer to prevent the escape of steam from these cylinder cocks when the engine was being used. You have heard the evidence that has been introduced upon that point, and it is for you to say whether the plaintiff has satisfied you by a fair and reasonable preponderance of the evidence that the engine was faulty in that particular. It is also charged by the plaintiff that the engine besides being faulty in this particular of the cylinder cocks, was in such condition that steam escaped from round the piston-rod, where the piston-rod entered the cylinder. You are to determine whether or no the defendant has used ordinary care in having the engine in good proper condition, and in a safe condition for the use of its employés when they were engaged in the business of switching in that yard at Glendive.

If you find in the evidence, as I have already stated, that this defect was not the proximate cause of the accident, then that is an end of the case, and your verdict must be for the defendant. On the other hand, if you find under the evidence that the coming up of the steam between the cars, if you find it did come up, was the proximate cause of the accident, then you will be required to consider and determine the question that arises under the charge of negligence which is made by the defendant railroad company against the plaintiff in this action.

To the giving of which portion of the charge the defendant duly excepted.

66 V. The court erred in charging the jury as follows:

It is claimed by the defendant that this was a rule which was in force, and that it required the employés not to make couplings by hand, or by the use of the hand alone, but that a stick or pin must be used, and that as the plaintiff himself has testified that he did not use a stick or pin, it is shown that he violated the rules by so doing and has contributed by his own negligence to the happening of this accident.

The question to be first determined is whether or not this rule was or was not in force at the time of this accident. The evidence shows that the defendant company printed a series of rules which have been introduced in evidence, among which is contained this rule 25 of which I have just read an abstract to you. The question for you to determine under the evidence is whether that rule was in fact in force. Generally, the duty and obligation of an employé is to observe the rules and regulations of the company that are in force. They are made for the guidance of the employés and the company has a right to direct how their business shall be carried on, and they shall have a right to demand from the employés that they will observe those rules. If the employé does not do that, but violates the rules and regulations, and from the violation of them receives an injury, of course he cannot recover from the defendant company if the rules are in force.

The question is whether under the evidence you are satisfied that the rule was in force. It is true that a rule may be adopted by a corporation; that it may be put in the form of printing; there may be printed rules and yet in effect it may be true, nevertheless, that the rule is not in force. In the first place the rule may never be really put in force; it may be adopted in the sense that it may be among the rules; it may be drafted as a rule by the company, but yet it never may be put in force and use, or it may be put in force and the company may abandon it and give it up, and then ordinarily it would cease to be a rule of the company.

This, gentlemen, has got to be viewed as a practical question; was that rule really in force? If it was the employé was bound to obey it; if it was not in force, then, of course, it was not a rule. You have heard the testimony that has been introduced in the case upon that question as to whether or no this rule was or was not in force. In the first place on behalf of the defendant they have introduced the rules themselves. There is a printed Book of Rules, and among them is the rule which I have read to you. Also as showing the knowledge of the plaintiff defendant's counsel has introduced his written statement or paper, signed by the plaintiff himself, and in that he states that he had
67 read and understands that very rule I have read to you, which as I have said, forms part of these printed rules in the book. Now that will justify you in finding that if it was a rule of the railroad company that was in force, it was binding upon the plaintiff, and unless the plaintiff by evidence in the case had satisfied you that in fact the rule was never put in force, if it had been put in force once, it had been abandoned, so that the railroad company no longer regarded it as a rule to be observed by the employés. You must determine that question of fact from the evidence that has been submitted to you, and determine whether that rule was or was not in fact in force at the time of the accident. If you find the rule was in force, and you further find that the plaintiff did not observe it, that he knew of this rule and did not observe it, and that in violation of that rule he went in there and attempted to make that coupling without the use of a stick or pin, and if you are further satisfied that

if he had used a stick or pin, this accident would not have occurred, then this evidence would justify you in finding that the charge of contributory negligence was made out against the plaintiff, and in that case your verdict would be for the defendant.

On the other hand, if you find that the rule was not in force, then that no longer cuts any figure in the case.

To the giving of which portion of the charge the defendant duly excepted.

VI. The court erred in charging the jury as it did in regard to the packing of the piston-rod being out of repair and being an element of negligence on the part of the defendant.

To the giving of which part of the charge the defendant duly excepted.

VII. The court erred in submitting to the jury the question of whether rule 25 was in force at the time of the accident.

To the giving of which portion of the charge the defendant duly excepted.

VIII. The court also erred in refusing to charge the jury, as requested by the defendant, as follows:

The court instructs the jury to bring in a verdict for the defendant; which said request was refused by the court, to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, which exception the court then and there allowed.

IX. The court also erred in refusing to instruct the jury as follows:

68 The court instructs the jury that if they believe from the evidence that the escape of steam from the hole where the piston-rod works, if the steam escaped therefrom, was the proximate and immediate cause of the accident, they must bring in a verdict for the defendant; which said request was refused by the court, to which refusal to charge as requested defendant's counsel then and there before the jury retired, duly excepted, and the court then and there allowed said exception.

And the said defendant prays that the judgment aforesaid rendered against it in this action for the errors aforesaid and the other many and manifest errors in the said record and proceedings aforesaid, may be reversed, canceled and altogether held for nothing, and that it may be restored in all things which it has lost by occasion of said judgment.

JNO. C. BULLITT, JR., AND
TILDEN R. SELMES,
*Attorneys for Defendant.*

Indorsed: United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Company, defendant. Assignments of error. Filed Oct. 3d, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

Know all men by these presents, that we, The Northern Pacific Railroad Company by Tilden R. Selmes, its attorney, as principal,

and The Saint Paul Title, Insurance & Trust Company of Saint Paul, Minnesota, as surety, are held and firmly bound unto Harry W. Nickels, in the full and just sum of eight thousand (8,000) dollars, to be paid to the said Harry W. Nickles, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 10th day of September, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, lately at *at* the March, 1891, term of the United States circuit court for the district of Minnesota, fourth division, in a suit pending between Harry W. Nickels, plaintiff, and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Harry W. Nickels, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

69 Now, the condition of the above obligation is such, that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC R. R. CO.,
By TILDEN R. SELMES, *Its Attorney.* [SEAL.]

Witness:
C. R. WILKERSON.

ST. PAUL TITLE, INSURANCE AND TRUST CO.,
By MAURICE AUERBACH, *Pres't.*
[CORPORATE SEAL.]

Attest: M. S. JOHNSON, *Secretary.*

Approved as supersedeas bond, Sept. 11, 1891.
O. P. SHIRAS, *Judge.*

Approved as supersedeas bond, Oct. 3, 1891.
R. R. NELSON, *Judge.*

Indorsed: Appeal bond.

Filed October 3rd, 1891.
OSCAR B. HILLIS, *Clerk,*
By C. C. WEBSTER, *Deputy.*

Indorsed: Ent. case No. 12. United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Co. Appeal bond. Filed October 3rd, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 120 pages, numbered consecutively from 1 to 120 inclusive, is a true and complete transcript of the records, process, pleadings, orders and final judgment and all other proceedings in said cause, viz: H. W. Nickels *vs.* Northern Pacific Railroad Company, and of the whole thereof, as appears from the original records and files of said court;
70 and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal of the United States Circuit Court, District of Minnesota, Fourth Division.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Minneapolis, in the district of Minnesota, this 30th day of November, A. D. 1891.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.

United States circuit court, district of Minnesota, fourth division. H. W. Nickels *vs.* Northern Pacific Railroad Company. Return to United — circuit court of appeals for the eighth circuit.

71 And on the third day of December, A. D. 1891, the appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error. } No. 49.

The clerk will enter my appearance as counsel for The Northern Pacific Railroad Company, plaintiff in error.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES.

Endorsed: "U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 49. Northern Pacific Railroad Company, plaintiff in error, *vs.* H. W. Nickels, defendant in error. Appearance. Filed Dec. 3, 1891. John D. Jordan, clerk. Jno. C. Bullitt, Jr., & Tilden R. Selmes, counsel for plaintiff in error."

And on the fifteenth day of January, A. D. 1892, the appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS. } No. 49.

The clerk will enter my appearance as counsel for the defendant in error.

F. D. LARRABEE.

72 Endorsed: "U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 49. Northern Pacific R. R. Co., plaintiff in error, *vs.* H. W. Nickels. Appearance. Filed Jan. 15, 1892. John D. Jordan, clerk. F. D. Larrabee, Minneapolis, Minn., counsel for def't in error."

And on the ninth day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error. } No. 49.

In error to the circuit court of the United States for the district of Minnesota.

MONDAY, *May 9th*, 1892.

This cause came on to be heard, and the Honorable Oliver P. Shiras, being disqualified by reason of having sat on the trial of this cause in the court below, retires, and the cause is heard before Judges Caldwell and Sanborn. Argument was commenced by Mr. Tilden R. Selmes in behalf of plaintiff in error and continued by Mr. F. D. Larrabee in behalf of defendant in error. At the conclusion of the argument for defendant in error, the further hearing of this cause was postponed until tomorrow morning.

And on the tenth day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

73 United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error. } No. 42.

In error to the circuit court of the United States for the district of Minnesota.

TUESDAY, *May 10th*, 1892.

This cause came on to be further heard, and argument was concluded by Mr. Tilden R. Selmes in behalf of the plaintiff in error. Thereupon the cause was submitted to Judges Caldwell and Sanborn upon the transcript of the record from the said circuit court and the briefs of counsel filed herein.

And on the twenty-third day of May, A. D. 1892, the opinion of said circuit court of appeals was filed in said cause in words and figures following, to wit:

74 United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error. } No. 49. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Tilden R. Selmes, for plaintiff in error.
Mr. F. D. Larrabee, for defendant in error.

Before Caldwell and Sanborn, circuit judges.

SANBORN, *Circuit Judge:*

H. W. Nickels, who was the plaintiff below, brought an action against the Northern Pacific Railroad Company for personal injury which he alleged was caused by the corporation's negligence. The defendant corporation denied its negligence, pleaded that the plaintiff Nickels had been guilty of negligence that contributed to his injury, and that he had agreed to be bound by and had then violated the rule of the company set forth below. The plaintiff had been an employé of the defendant from June 26th, 1889, until December 16th, 1889, when he was injured, and during this time had served sometimes as brakeman and at other times as switchman in the yard at Glendive. On the twelfth day of November, 1889, he signed and delivered to the defendant a writing entitled a "personal record," consisting principally of questions and answers relative to his age, residence, former occupations and general qualifications for the position of brakeman, from which the following is an extract: "13. Have you read and do you understand the following abstract from the Book of Rules of the Northern Pacific Railroad Company?

Yes. Caution as to personal safety (25)—Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or persons of those engaged in coupling, all employés are enjoined before coupling cars or engines to examine so as to know the kind and condition of the drawheads, drawbars, links and coupling apparatus. * * * Coupling by hand is strictly prohibited. Use for guiding the link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose above specified. * * * All will be held responsible. 14. Do you agree to comply with all the requirements of the foregoing rule in case you enter into the company's employ? Yes. 15. You are notified that if you or any other employé chooses to violate the requirements of any other rules contained in the Book of Rules of the Northern Pacific R. R. Company you do so solely at your own risk. The company expects you and all other employés to comply strictly with all its rules and regulations, and does not and will not in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employé of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes." Over the objection of the defendant the court below permitted the plaintiff and others, who had been employed as brakemen by the defendant, to testify that none of the employés of that corporation engaged in coupling cars had, so far as their knowledge extended, ever used a stick or pin in coupling them; that those engaged in this work at Glendive, where the accident happened, had constantly coupled the cars without its use and that the division superintendent of the corporation, whose office was in the upper story of the depot, in the center of this yard at Glendive, had frequently seen the employés thus coupling without sticks and made no complaint or objection, and upon this subject the court charged the jury that it was a question of fact for them to determine from all the evidence, whether this rule, requiring the use of a stick or pin in coupling the cars, was in force at the time of the accident; and that if they found it was not in force, the plaintiff could not be deemed guilty of contributory negligence because he failed to comply with this rule.

On the thirteenth day of December, 1889, plaintiff commenced to work as a switchman in the railroad yard at Glendive, under the direction of the yardmaster, with an engine that was so defective that unusually large volumes of steam constantly escaped from its cylinders and enveloped the engine and some of the cars. On the next day, and again on the succeeding day, he notified the yardmaster of this defect and the danger from it, and protested against working with it. The yardmaster communicated the notice and complaint to the master mechanic, and requested the plaintiff to continue at his work, promising on one day that he would see if he could get the engine repaired, and on the next that they should

have a new engine very soon. About nine o'clock in the evening of December sixteenth, as the yardmaster's crew was making up a freight train, he directed the plaintiff to couple a car, that this defective engine was moving back about as fast as a man would walk, to a stationary car it was approaching. Both these cars were furnished with double dead-woods—that is, cast-iron projections, eight inches square, about eight inches above the drawbar and about eighteen inches distant from it on each side thereof, so constructed that as soon as the drawbars of the approaching cars touched, the double dead-woods would strike each other. The night
76 was dark; plaintiff carried his lantern on one arm, and when the moving car was about eight feet distant from the stationary car he stepped in between the rails, grasped the link attached to the moving car and walked back toward the stationary car until he came within about eighteen inches of it, when the defective cylinders of the engine emitted such unusual volumes of steam that he could not see anything. He immediately dropped the link and started to escape. As he did so he raised his arm and the dead-woods caught and crushed his wrist. Plaintiff knew that foreign freight cars sometimes had double dead-woods, and that it was his duty to look out for them. He saw them on the moving car as he stepped in front of it, and looked for them on the stationary car, but owing to the darkness could not see them when he stepped in and started toward them, and did not see them before the steam blinded him, and did not know there were double dead-woods on that car until they caught his wrist. Cars with double dead-woods can be safely coupled, if there is nothing to obscure the light so that the switchman can see their location, by reaching under them with the right hand to guide the link, and over them with the left hand to drop the pin; but it is far less difficult and less dangerous to couple cars with single dead-woods. The freight cars of the Northern Pacific Railroad Company, and of western roads generally, are provided with single dead-woods.

On this state of facts defendant's counsel requested the court to instruct the jury to return a verdict for the defendant. This request was refused, plaintiff had a verdict, and this refusal is assigned as error.

It was the duty of the defendant railroad company to use ordinary care to supply its employés with reasonably safe machinery and appliances with which to operate its railroad, and to use due diligence in keeping the machinery furnished in proper repair. There is ample and convincing evidence to sustain the conclusion, to which the jury must have arrived, that the corporation failed in the performance of this duty, and that its culpable negligence in continuing in service this defective engine after repeated notices of its defects and warnings of the dangers of its use, resulted in the emission from its cylinders of the unusual volumes of steam that enveloped and blinded the plaintiff at the critical instant when the cars came together and caused the loss of his hand. Indeed, this was conceded on the argument, and the only questions for considera-

tion have reference to the alleged contributory negligence of the plaintiff. Here two questions are presented:

First. Is the mere disregard by an employé of a certain rule of a railroad company such negligence on the part of such employé as will absolutely defeat his recovery for an injury caused by the negligence of the corporation, when with the knowledge and acquiescence of the superintendent in sole charge of the operation of a great division of a railroad comprising hundreds of miles, such employé and all others to whom the rule applies have, prior to the accident, constantly and without exception disregarded it?

Second. Do the facts of this case so clearly prove contributory negligence on the part of the plaintiff that it was the duty of the court below to give the jury a peremptory instruction in favor of the defendant?

77 1. Regarding the first question, it must be borne in mind that the plaintiff had acted as brakeman and switchman on defendant's railroad for about six months when this accident happened; that he had constantly disregarded this rule; that he had never used a stick or pin to couple cars; that all the other employés with whom he was associated had constantly disregarded it; that the evidence is that no witness ever saw any one obey the rule or use a stick or pin to couple cars on this railroad in a single instance; that during several weeks this plaintiff had been thus coupling cars without a stick in the railroad yard at Glendive, where he was injured, immediately under the eye of Mr. Marsh, the superintendent of the Yellowstone division of this railroad, who "was the only officer having control of the operation of that part of the road" upon which the plaintiff was working at Glendive; that the office of this superintendent was in the upper story of the depot building, which stands in the center of the railroad yard at Glendive, and that this superintendent had repeatedly seen these employés coupling cars without sticks or pins to guide the links. Here was competent evidence of the knowledge and acquiescence of this division superintendent, who had sole control of the operation of that part of this road, in the complete disregard of the rule; that his knowledge and acquiescence were the knowledge and acquiescence of the defendant company cannot admit of doubt, for he was the only officer in control of the operation of the road on that great division. The court below submitted the evidence of these facts to the jury as tending to show that this rule was not really in force at the time of the accident, with instructions to the effect that if they found it was not in force its disregard by the plaintiff might not be contributory negligence; but that if they found it was in force and the plaintiff's disregard of it contributed to his injury he could not recover. There are some decisions in the books holding that the habitual and customary disregard of such a rule as that in question by brakemen and switchmen is not sufficient to prove a waiver or abandonment of the rule by the corporation, where it was not proved that the officer of the corporation in charge of its enforcement knew of, or acquiesced in its disregard. But in the case at bar the utter and total disregard of this rule was proved to be known

to the very officer who, if any one was, must have been charged with the enforcement of this rule on his division of this railroad. The disregard or violation of the rule was not merely habitual, customary; it was complete. The evidence of the witnesses is that none of them ever saw one instance in which the rule was complied with on the defendant's railroad. To hold that this defendant company could make this rule on paper, call it to plaintiff's attention and give him written notice that he must obey it and be bound by it on one day and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employés associated with him, on every day he was in its service and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury were authorized to believe from the long-continued acquiescence of the defendant in the disregard of this rule that it had been abandoned, that it was not in force. The
78 evidence of such abandonment was competent and ample and the ruling and charge of the court below on this subject were right. (Barry *v.* Hannibal & St. J. R'y Co., 98 Mo., 62; Smith *v.* Railway Co., 18 Fed. Rep., 304; Schaub *v.* Hannibal & St. J. R. R. Co., 16 S. W., 924; Smith *v.* Memphis & St. L. R. R. Co., 18 Fed. Rep., 304.)

But defendant's counsel contends that evidence of the waiver or abandonment of this rule was not competent or material, because by the writing he signed on November 12th, 1889, he had agreed to comply with this rule and that he would take upon himself alone all risk of its violation.

There is some doubt whether this writing, under the evidence in this case, rises to the dignity of a solemn contract made for a valuable consideration; it is styled "personal record" and consists very largely of questions and answers relative to the qualifications of plaintiff to serve as a brakeman; it is dated Nov. 12th, 1889, and is alleged to have been made in consideration of the employment of plaintiff by defendant at a subsequent date, but the evidence discloses the fact that he was employed by defendant June 26th, 1889, more than four months before this paper was signed, and that he remained in defendant's service continually from that date until he was injured, so that it would seem that this writing could not be successfully claimed to be proof of anything more than notice to the plaintiff of the existence of the rule in this particular case.

But if it was a contract, it is clear that it could not bar the plaintiff from proving a waiver or abandonment of the rule. This writing was prepared by the defendant; all the plaintiff had to do with it was to answer the questions and sign his name. It contained in it these words: "The company expects you and all other employés to comply strictly with all its rules and regulations, and does not, and will not in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employé of the company, whether

habitual or otherwise, are not consented to or acquiesced in by the company? Yes." There are at least two parties to every contract, and this provision was a representation and a contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules. The plaintiff signed the contract and proceeded with his service. He must have immediately discovered that if there really was any rule about the use of sticks and pins in coupling cars it was constantly violated on this railroad; that the defendant knew of this violation and acquiesced in it. This uniform and constant acquiescence of the defendant in the violation of this rule, if such a rule was really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the utter disregard of the rule and defendant's acquiescence therein were competent evidence of the abandonment. In either case, the plaintiff had a right to rely on the conduct of the defendant and to introduce his evidence in this behalf.

2. The second question for determination is, Did the evidence so clearly prove that the plaintiff was guilty of contributory
79 negligence that the court below should have given a peremptory instruction in favor of the defendant. It was plaintiff's duty to exercise reasonable care commensurate with the dangerous character of his occupation, to protect himself from injury; he could not recklessly expose himself to a known danger and then recover from the defendant for an injury to which such exposure contributed. The contention of defendant's counsel is that it was the duty of the plaintiff in the exercise of ordinary care to examine the stationary car and know whether there were double dead-woods on it before he stepped in between the rails to make the coupling; that the plaintiff testified that the first step in coupling cars was to set the pin; that the pin was in the stationary car; that if plaintiff had first stepped to the stationary car and set the pin he would have discovered the double dead-woods on that car and would not have been injured; that in stepping in between the rails and grasping the link of the moving car when it was eight feet distant from the stationary car he was not in the act of coupling the cars or in the line of his duty, but was carelessly exposing himself to injury, and that by this unnecessary and reckless exposure he contributed to his own injury. It is a general rule that if reasonable and fair-minded men of ordinary intelligence may differ as to the conclusion to be drawn from a given state of facts the question of negligence is for the jury to determine from the facts and all the surrounding circumstances. Can it be said that fair-minded men of ordinary intelligence would agree that there was any want of reasonable care on plaintiff's part in stepping in front of the moving car and grasping the link to guide it into the slot when it was only eight feet distant from the stationary car, and the plaintiff had been directed by his superior, the yardmaster, to make the coupling under the circumstances of this case? Cars cannot be coupled when

both are stationary; they cannot be coupled after the moving car strikes the stationary car, save by a renewed endeavor; at some time while one of the cars is moving the link must be seized and guided; this car was moving four miles an hour and would traverse the space of eight feet in less than two seconds.

Again, defendant's counsel bases his contention that plaintiff was negligent and out of the line of his duty in stepping in and grasping the link before he set the pin, upon his testimony that the first thing to do in coupling a car is to set the pin. That statement, however, cannot be held to so conclusively prove that it was negligence to seize the link before setting the pin as to authorize a court to take this question of negligence from the jury on that account. Indeed, the entire testimony of this witness shows that this statement of his was not sufficient to conclusively prove that any prescribed order of handling link and pin was the only careful or the safest method of handling them in coupling the cars. At another time, while testifying, he said: "Coupling cars, generally you take the link of the moving car. * * * When you leave a car you leave the pin standing up in the hole, and when you come to make the coupling you take this link and you place the pin in the other car so it will fall, and then when this link comes in here, you raise it up and direct it this way into the slot of the other drawbar, and when the cars come together the pin falls into the link." But
80 perhaps the most conclusive answer to defendant's counsel is, that if plaintiff had first stepped to the stationary car and set the pin and then waited for the coming car, while he would have discovered the double dead-woods on the stationary car, the blinding steam would in all human probability have obscured his vision before the moving car came near enough for him to discover the double dead-woods on that car, and he would have suffered the same or a much more serious injury.

Under the evidence in this case no court would be authorized to declare the plaintiff guilty of negligence that contributed to his injury, and the judgment is—

Affirmed.

Filed May 23, 1892.
A true copy.
Attest:
____ ____,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

81 And on the twenty-third day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error. } No. 49.

In error to the circuit court of the United States for the district of Minnesota.

MONDAY, *May 23rd*, 1892.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in
82 this cause be, and the same is hereby, affirmed, with costs, and that the said H. W. Nickels recover against the Northern Pacific Railroad Company the sum of twenty dollars for his costs herein expended and have execution therefor.

May 23, 1892.

And on the eleventh day of July, A. D. 1892, an assignment of errors by counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error.

Now comes the above-named plaintiff in error, The Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the eighth circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals.

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Minnesota to said circuit court of appeals, erred in making its order on the twenty-third day of May, 1892, affirming the judgment of the said circuit court and directing a mandate to issue to the circuit court of the United States for the district of Minnesota, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

83 Third. The said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not di-

recting a new trial of the issues raised by the pleadings in said action.

And said Northern Pacific Railroad Company, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the district of Minnesota and the order entered herein as aforesaid by the circuit court of appeals and the judgment of affirmance to be entered in said circuit court for the district of Minnesota upon said order of affirmance, for the errors aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgments and order.

JAMES McNAUGHT,
JNO. C. BULLITT, JR., &
TILDEN R. SELMES,
*Attorneys for Plaintiff in Error.*

And on said eleventh day of July, A. D. 1892, there was filed by counsel for plaintiff in error in the clerk's office of said circuit court of appeals in said cause a petition for writ of error in words and figures following:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error.

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United
84 States circuit court of appeals for the eighth circuit in the above-entitled cause a manifest error hath happened, to the great damage of your petitioner, in this, that a great and manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage; all of which will more fully appear by the record of said court in said case.

Wherefore your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States, to be directed to said United States circuit court of appeals for the eighth circuit, whereby, under the seal of said United States circuit court of appeals for the eighth circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with said writ of error, and that, the record and proceedings aforesaid being duly inspected, the said Supreme Court of the United States will cause further to be done therein *and* correct that error what of right and according to the laws and customs of the United States should be done.

JAMES McNAUGHT,
JNO. C. BULLITT, JR.,
TILDEN R. SELMES,
*Attorney for Petitioner.*

85 And on the eleventh day of July, A. D. 1892, there was filed, by counsel for plaintiff in error, in the clerk's office of said circuit court of appeals in said cause a supersedeas bond on writ of error in the words and figures following:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error.

Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of the Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved July 2, 1864, by W. S. Mellon, its general manager, as principal, and Frank A. Seymour, of St. Paul, Minnesota, and E. C. Long, of St. Paul, Minnesota, as sureties, are held and firmly bound unto the above-named H. W. Nickels in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said H. W. Nickels, his executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and the successors and assigns of said company, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of the United States to the circuit court of appeals for the eighth circuit to reverse an order made by said United States circuit court of appeals
86 herein, directing that a mandate issue to the circuit court of the United States for the district of Minnesota, which mandate directs said circuit court to enter judgment affirming the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By WM. S. MELLON.
FRANK A. SEYMOUR. [SEAL.]
E. C. LONG. [SEAL.]

L. HELWIG.
TILDEN R. SELMES.

Bond approved June 27th, 1892.

DAVID J. BREWER,
*Associate Justice.*

UNITED STATES OF AMERICA, }
*District of Minnesota.* }

Frank A. Seymour and E. C. Long, being severally duly sworn, each for himself, deposes and says that he is one of the sureties who executed the foregoing bond; that he, said Frank A. Seymour, is a resident and freeholder, and he, said E. C. Long, is a resident and freeholder in said district of Minnesota, and is worth the sum of ten thousand dollars over all his just debts and liabilities.

FRANK A. SEYMOUR.
E. C. LONG.

Sworn to before me this 16th day of June, 1892.

A. L. AYLESWORTH,
[SEAL.] *Notary Public, Ramsey County, Minn.*

87 And on the said eleventh day of July, A. D. 1892, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and H. W. Nickels, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the twenty-seventh day of July next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and sixteenth.

JAMES H. McKENNEY,
*Clerk Supreme Court U. S.*

Allowed by—
DAVID J. BREWER, *Associate Justice.*

*Return to Writ of Error.*

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals, at office, in the city of St. Louis, Missouri, this 16th day of July, A. D. 1892.

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

[Endorsed:] N. P. R. R. Co., pl'ff in error, *vs.* H. W. Nickels, def't in error. Writ of error. Service admitted July 9th, '92. F. D. Larrabee. Filed Jul- 11, 1892. John D. Jordan, clerk.

89 And on said eleventh day of July, A. D. 1892, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

90 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
*vs.*
H. W. NICKELS, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

To H. W. Nickels, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the twenty-seventh day of July next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 27 day of June, A. D. 1892.

DAVID J. BREWER,
*Associate Justice.*

[Endorsed:] 49. N. P. R. R. Co., pl'ff in error, *vs.* H. W. Nickels, def't in error. Citation. Service admitted July 9th, '92. F. D. Larrabee. Filed Jul-11, 1892. John D. Jordan, clerk.

91 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, numbered from one to 90, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Pacific Railroad Company, plaintiff in error, *vs.* H. W. Nickels, defendant in error, No. 49, October term, 1891, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 16th day of July, A. D. 1892.

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Endorsed on cover: Case No. 15,115. United States circuit court of appeals, eighth circuit. Term No., 152. The Northern Pacific Railroad Company, plaintiff in error, *vs.* H. W. Nickels. Filed August 29, 1892.